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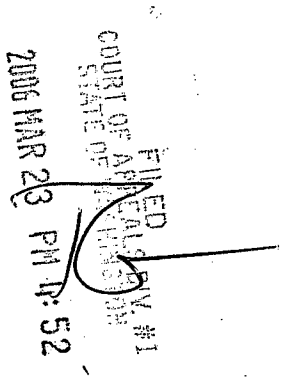

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN,
Plaintiffs/Appellants

v.

HOLLAND AMERICA LINE USA, INC., a Delaware Corporation, and HOLLAND AMERICA LINE, INC., a Washington Corporation,
Defendants/Appellees

REPLY OF APPELLANTS/PLAINTIFFS TO DEFENDANTS/RESPONDENTS RESPONSE BRIEF JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN

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Factual Background/Procedural History

In the "factual" segment of their response, the Defendants /Respondents, Holland America Line-USA Inc. and Holland America Line Inc. (hereinafter "Defendant Cruise Lines"), have not only colored the facts a bit, but have also snuck in a few legal arguments – thus, we felt compelled to set the record straight. To begin, the Defendant Cruise Lines assert that the Plaintiffs/Appellants Jack and Bernice Oltman could not have boarded the vessel without tickets. To this, Plaintiffs would tend to agree, as at no time have Plaintiffs alleged that Jack and Bernice boarded the Ms. Amsterdam without the proper documents and/or were on board illegally. Instead, what the Plaintiffs allege is that Jack and Bernice did not receive their tickets, which included the purported Cruise and Cruisetour contract until either just before boarding or at the time that they actually boarded the ship on March 31, 2004. (CP 231-233 Declaration of Jack Oltman, par. 9) The Defendant/Cruise Lines do not dispute this fact.

Turning to another issue in need attention, in footnote 1 on page 1 of Respondents' brief, the Defendant Cruise Lines argue for the very first time that Susan Oltman's claim of loss of consortium is derivative of her husband, Jack Oltman's claim. Not once, in their Motion for Summary Judgment did the Defendants assert such a claim.

Next, on page 4 of their brief, Defendants argue that the parties

"contractually chose" the US District Court for Washington. Just below this assertion is another one made by the Defendant cruise lines, where the Defendants write "there is no doubt that federal subject matter jurisdiction exists." Both contentions are, of course, arguments which should not have been contained in the factual section – arguments to which the Plaintiffs vehemently disagree.[1]

Last, in the "Procedural" section of their brief (page 4), in addition to the Defendant Cruise Lines having engaged in more argument, the Defendants' assert what they maintain to be an undisputed fact but which is and would certainly be in disagreement – that is, the length of time that has run from the day that Plaintiffs' claims arose to the date they filed suit. In the trial court below, Defendants **did not** contest Plaintiffs' assertion that Plaintiffs would have had time to re-file in federal court. Thus, the Court of Appeals has yet another brand new defense raised by the Defendants on appeal. Again, Plaintiffs will defer refuting this argument until later this brief, and simply wanted to point this dispute out to the Court.

II. ARGUMENT

A. STANDARDS OF REVIEW

[1] In Defendants' footnote 3 of page four of their brief, Defendants cite *Karter v. Holland America Line Westours*, 1997 A.M.C. 857,858 (W.D. WA 1996) a case involving the suitability of depositions in a foreign state where the Plaintiffs had first instituted suit in the correct forum state. The holding in that case, then, does not appear to be the holding asserted by the Defendants – a theme that pervades their briefing.

1. Summary Judgment

Plaintiffs disagree with the Defendant Cruise Lines' recitation of the standard of review in that not only is it not a neutral one, but it also fails to include important elements of the summary judgment standard, including, and very importantly so, that it is **the moving party's** burden to prove not only that there are no material facts in dispute but also to prove that the moving party is entitled to judgment as a matter of law.

Furthermore, unlike the standard set forth by the Defendants, it is clear (to Plaintiffs at least) that all motions and issues heard in conjunction with the summary judgment motion are also reviewed under the same standard as the summary judgment motion – this would include the Motions to Strike.[2] Plaintiffs' counsel have also reviewed the cases cited by the Defendants which purport to support the position that Motions to Strike bring forth an "abuse of discretion" standard by the Court. The cases cited by the Defendants appear to involve discovery issues and not at all the issues involved in this case. Thus, we would respectfully request that the Court utilize the Plaintiffs' recitation of the standard as set forth in

[2] But noting that the Motion to Strike the Affirmative Defenses of the Defendant was filed prior to the hearing on the Motion for Summary Judgment, and thus, potentially could fall outside the scope of "heard in conjunction with". Though, the Plaintiffs would argue that since Defendants' summary judgment is based on the issues related to this Motion and also the fact that the Plaintiffs attempted to reassert this objection and motion to strike at the summary judgment hearing, that a de novo review of all issues associated with this appeal would be most appropriate. Failing that, Plaintiffs believe that where an error of law is made, the review is also *de novo*.

Appellants' opening brief.[3]

B. PLAINTIFFS' MOTION TO STRIKE THE AFFIRMATIVE DEFENSES OF THE DEFENDANTS/CRUISE LINES

Plaintiffs moved to strike the Defendants' affirmative defenses not only because the Defendants' answer was late (and therefore the affirmative defenses contained in that answer were late), but because actual prejudice befell the Plaintiffs due specifically to the Defendants' failure to file a timely answer.

In the beginning of their argument, the Defendant Cruise Lines assert that Plaintiffs have no legal basis to make this argument. However, Plaintiffs rely on CR 4 which clearly requires Defendants (using the command word "shall") to file their answer within 20 days. Plaintiffs

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[3]Pursuant to CR 56, a grant of Summary Judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The opposing party does not need to submit affidavits or responding materials unless the movant meets its burden. *Hash v. Childrens' Orthopedic Hosp. & Med. Ctr.*, 110 Wn. 2d 912, 757 P.2d 507 (1988). All evidence is considered in a light most favorable to the nonmoving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 349, 588 P.2d 1346 (1979). Furthermore, a motion for summary judgment may be granted only if reasonable people could reach but one conclusion from the evidence. *McKee v. Am. Home Prods.*, 113 Wn. 2d 701, 782 P.2d 1045 (1989). Otherwise, the court must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the nonmoving party to the relief sought. *Mostrom v. Pettibon*, 25 Wn. App. 158, 607 P.2d 864 (1980). Even if the facts are not in dispute, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County,* 109 Wash.2d 282, 295, 745 P.2d 1 (1987). The absence of a finding can be considered a negative finding in some cases. *See Smith v. King,* 106 Wn.2d 443, 451, 722 P.2d 796 (1986).
The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The question of whether an ambiguity exists in a contract is also an issue of law reviewed *de novo. Stranberg v. Lasz,* 115 Wn.App. 396, 402, 63 P.3d 809 (2003). The interpretation of an unambiguous contract is a question of law, even if the parties dispute the legal effect of an unambiguous provision. *Id.* at 420.

recognize, however, that Washington Courts have not enforced the mandatory language of this rule, unless, Plaintiffs assert, there has been actual prejudice to the Plaintiffs. Plaintiffs had previously cited *Davidson v. Hensen*, 135 Wn.2d 112, 954 P.2d 1327 (1998) for the proposition that the Supreme Court has recognized that prejudice may be a bar to the raising of a late filed affirmative defense. However, the Defendants, in their response, have attempted to distinguish *Davidson*. In re-reviewing the law in this realm, Plaintiffs' counsel found one additional published case. Although it is a Ninth Circuit case, and although the Court ruled against the party whom was attempting to strike an answer, the Court specifically addressed the issue of prejudice – acknowledging prejudice as a bar, but failing to find that the party moving to strike the answer had suffered actual prejudice –the court writes, "it does not appear that the short delay occasioned by Zeno's untimely filing caused any prejudice to any party." *National Labor Relations Board v. Zeno Table Company, Inc.*, 610 F.2d 567, 569 (9th Cir. 1979). Plaintiffs urge Division 1 of the Court of Appeals, to adopt a prejudice standard in a published decision, otherwise, Defendants will continue to take free liberty with CR 4 and fail to file answers until compelled.

The Parties of course disagree on whether Plaintiffs have suffered prejudice. Plaintiffs argue that had the Defendants answered within twenty

days, the Plaintiffs would have had an opportunity to consider the affirmative defense raised by the Defendants and could have re-filed in federal court.[4] Defendants, on the other hand, argue that even had the Defendant Cruise Lines answered within the required time period that even then the Plaintiffs would not have been able to re-file in federal court due to the one year limitation imposed by the Defendants' cruise ticket. Just like their "consortium is a derivative claim" argument, this factual dispute over timing is the first time that Defendants raise this issue as they had failed to refute the facts asserted by Plaintiffs below.

Although Plaintiffs would assert that there must be some end to what Defendants can argue on appeal when they failed to do so below, even were the Defendant cruise lines permitted to raise this issue on appeal, then it results only in a dispute as to a material fact – thereby requiring reversal and remand on this point. "The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is ordinarily a question of fact." *Green et al, v. A.P.C. et al*, 136 Wash.2d 87, 100, 960 P.2d 912 (1998) (*citing Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 34-35, 864 P.2d 921 (1993)).

[4] Plaintiffs do not believe that even if Defendants' forum selection clause is applicable to the present case that the Plaintiffs in fact violated it as the State Court was a permissible forum. Thus, the argument here is that the Defendants' did not provide the Plaintiffs the opportunity to consider re-filing in Federal Court due to their tardiness.

In addition, should the court engage in this inquiry, 46 U.S.C.A. App. § 183b(a) provides additional guidance:

> It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels, and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six month, and for the institution of suits on such claims, than one year, **such period for institution of suits to be computed from the day when the death or injury occurred.**

Thus, even were the Defendants' cruise ship contract found to be valid and applicable, its shortened statute of limitations would not be valid unless it complies with 46 U.S.C.A. App. § 183b(a), requiring that the one year shortened limitation on suits begin its accrual from the date of the harm, not the date of the alleged contract.[5]

Were the court to review the record to determine if evidence could be found to support the Defendants on this point, the Court would find that the record is bare as far as actual dates of injury and that there certainly there is no proof provided by Defendants' that Plaintiffs' injuries occurred on March 31, 2004 (the date Plaintiffs Jack and Bernice Oltman boarded

[5] Not only does 46 U.S.C.A. App § 183b(a) run counter to the Defendants' new argument, but so does, it would seem, *Lieb v. Royal Caribbean Cruise Line, Inc.*, 645 F. Supp 232, 235 (S.D.N.Y. 1986). This is an especially interesting case because it was cited by the Defendants in their Responsive brief to argue that Plaintiff Susan Oltman's claim is derivative of her husband's claim and begins to run from the date the underlying injury occurred. (Resp brief pg 15).

the Ms Amsterdam and the date which the Defendants now assert).[6] From the record, it is possible that Defendants' negligence did not take effect until the latter part of April. In such a case, Plaintiffs would have had until, potentially, April 17 or later, to bring suit under the Defendants shortened statute of limitations clause.

Because Defendants disregarded the Washington Rules of Civil Procedure and chose to file their Answer late, the Plaintiffs have now suffered actual prejudice.[7] As a result, Plaintiffs request that the Court reverse the trial court and set a firm rule on the issue of prejudice while not permit these and future Defendants to benefit from a deliberate violation of the Rules of Civil Procedure.

C. MOTION TO STRIKE DECLARATION OF ATTORNEY MIDDLETON

Plaintiffs' Motion to Strike the Declaration of Attorney Middleton submitted in support of the Defendants' Motion for Summary Judgment (CP 195-204) was heard just prior to the trial court's hearing on

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[6] Paragraph 21 of the Complaint reads: "[a]s a result of the conditions on board the Amsterdam, Jack and Bernice Oltman contracted a severe gastrointestinal illness, the symptoms and/or side effects of which include, but not limited to: various stomach disorders, hemorrhaging, sleeping disorders, anxiety attacks, and depression." CP3-12. In fact, from the declarations of the Plaintiffs it is apparent that many of the ailments were suffered at different times. (See e.g., CP 231-233"Decl. of J. Oltman", CP 235-236"Decl. of Bernice Oltman, CP238-239 "Decl. of Susan Oltman").

[7] Defendants attempt to assert *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn.App.[citation missing from Resp brief] 937 P.2d 1158 (1997). However *Voicelink* provides no support to the Defendants in this case because here we're dealing with the Defendants' utilization of a one year shortened statute of limitations clause – a clause that the Defendants seek to benefit from by having first held out on their Answer.

Defendants' Motion for Summary Judgment and therefore was heard "in conjunction" with the Summary Judgment hearing. The standard of review is *de novo*.

Defendants' in their Response allege that two of the nine cases cited by Attorney Middleton's declaration (CP 154-194) were actually published ones. Assuming arguendo that this is the case, that still leaves seven unpublished cases. Plaintiffs in their opening brief cited the following three reasons why the trial court should have struck Attorney Middleton's declaration (and these citations to unpublished cases): 1) Washington law prohibits an attorney from citing unpublished cases; 2) RPC 3.7 prohibiting attorneys from testifying as clients; and 3) Evidentiary Rules 401 and 403.

Of these arguments, Defendants seem to fail to address the prohibition on citing unpublished cases – cases from the trial court which have even less precedential value than those unpublished cases heard by the Court of Appeals. Yet, in his declaration in support of the Motion for Summary Judgment, it seems clear that Attorney Middleton is citing these cases as authority to the court in support of the Motion for Summary Judgment. As for the second issue in support of striking, Defendants do try and argue an exception under RPC 3.7, stating that Attorney Middleton was arguing merely an uncontested formality (Resp. Brief at pg 12), but

citation to these cases (cases from another court, and cases that do not have the same facts nor the same legal arguments) is certainly not an uncontested formality.[8]

D. LOSS OF CONSORTIUM

The Defendant failed to raise any issue with regard to consortium and Susan Oltman except, as they note, in a footnote in their reply brief to Plaintiffs' response to the summary judgment motion. (See Resp brief pg. 15) Certainly, it is beyond question that the Defendant failed to offer (much less prove) to the trial court how Susan Oltman could be held to a contract she did not sign.[9] Now, for the first time, the Defendants are attempting to answer that question. While the Plaintiffs would ask that the Court not entertain any new argument or set of facts introduced by the Defendants which they did not present or argue below, should the Court

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[8] Defendants seem to agree that the unpublished opinions were offered as precedential value as opposed to evidence. (See Resp. Brief pg 12), and therefore the Evidentiary Rules argument (401/403) may be moot.
Finally, in a last ditch argument to save this issue, Defendants attempt to argue that although Plaintiffs objected to the unpublished cases cited by Attorney Middleton in support of the Motion for Summary Judgment that because the Plaintiffs did not specifically object to their inclusion in the Motion for Summary Judgment (a Motion which had relied on the Declaration of Attorney Middleton) that for that reason they should be permitted. This argument is specious. But, if the Defendants actually believe that this is a valid argument, then perhaps the Court should make clear to all lawyers and litigants in this State that when a party objects to another party's use of unpublished cases, contained in an attorney's declaration (or elsewhere) and the summary judgment is based on the declaration, that all of the unpublished cases which have been identified are to be stricken.

[9] The Supreme Court in Green et al v. A.P.C et al, 136 Wash.2d 87, 101, 960 P.2d 912 (1998) refers to absences in the record such as these as "evidentiary voids". "[The moving party] offered only the argument of counsel. Argument of counsel does not constitute evidence."

allow such argument (under the notion that decisions may be affirmed on any ground), the Court should still not permit new evidence to be argued, evidence which is not supported by the record below.

Even were the Court to allow the Defendants to make their "derivative consortium claim" argument, then it should be noted that the Defendants recitation of the law to the Court is not correct on this point.

In Washington *Green et al v. A.P.C. et al*, 136 Wash.2d 87, 960 P. 2d 912 (1998) makes it very clear that "Washington recognizes loss of consortium as a separate, **not** a derivative, claim." Id at 101 (emphasis added). Instead of citing Washington law on this point, Defendants cite an inapplicable and non controlling decision from the fifth circuit (Resp. brief, pg 15).

Defendant Cruise Lines next attempt to assert that a loss of consortium claimant cannot recover damages when the injury occurred outside of territorial waters.[10] This argument should be disregarded by the Court as not only have the Defendants failed to properly Move the court on this item (by failing to provide 28 days notice and by failing to include this issue in their motion for summary judgment at all – instead hiding it in

[10] Plaintiff Susan Oltman's loss of consortium is a state law claim, and not federal. It is also clear, since the Supreme Court's decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578, 1996 AMC 305 (1996), that loss of society/consortium damages are available for deaths or injuries in territorial or state waters under state law. *Kelly v. Bass Enterprises*, 17 F.Supp.2d 591, 1999 AMC 173 (E.D.La. 1998); *Price v. Consolidated Coal Co., Inc.*, 2002 AMC 1179 (N.D.W.Va.2001).

a footnote in their reply brief), but even then, the Defendants fail to make any factual assertion or to state that such a fact is not in dispute, where it clearly would be. This is because the Plaintiffs have not asserted that their injuries occurred in one place or due to one defining action. The record does not support such an assertion. Thus this issue would clearly be factual and would clearly be in dispute. While it is seemingly unfair to have a party moving for summary judgment attempt to ambush a non-moving party by placing unsupported arguments in footnotes in reply briefs on summary judgment, the record still does not support the position taken by the Defendants.

E. THE PASSENGER TICKET, THE FORUM SELECTION CLAUSE AND FEDERAL JURISDICTION

At this stage in the Respondents' Brief, page 17, and perhaps due in part to the difficult subject matter before the Court and Parties, the Defendant Cruise Lines' arguments turn into a bit of a yard sale, combining distinct legal points, addressing points in piecemeal (without addressing cases cited by Appellant) and blending all the different theories into one. In an effort to clarify the issues, Appellants will now re-identify and re-place the issues before the court and attempt to try and forge a roadmap for review.

To begin, Appellant/Plaintiffs' substantive opposition to the

Defendants' Motion for Summary Judgment (through which the Defendant Cruise Lines argued that a forum selection clause contained in the cruise line passenger ticket required litigation in federal court over state), raised the following two basic arguments:

- Whether an enforceable contract come into Existence between the Defendant Cruise Ship and Plaintiffs (and are all of its terms enforceable)? This discussion may be further broken down into:
  - State law analysis vs Federal law
- If the terms are valid and enforceable, then the next step is determining whether or not the Plaintiffs in fact complied with those terms (Plaintiffs believe they have)

1. Contract Formation and the State vs Federal Law Dilemma

Defendants assert that the passenger contract is always governed by federal maritime law. Plaintiffs disagree. While a passenger contract may be governed by federal maritime law, depending on the issues it may also be governed by state law – with the personal injury element falling under maritime law (if one is evident). Disputes concerning these tickets may also be filed in state court but governed by federal maritime law. There also appears to be an opportunity for both federal and state law to apply to different claims in the same case, thus, a mix of both. **And**, as Defendants note in their responsive brief, there is no requirement that maritime cases be brought solely in federal court. (Resp brief pg 17).

a. Application of State Law to the Present case

In their brief, the Defendant Cruise Lines attempt to rely on a court of appeals case from California, *Schlessinger v. Holland America N.V.* 120 Cal.Appp.4th 552, 16 Cal.Rptr.3d 5 (2004), which, Defendants argue, stands for the proposition that in California a forum selection clause in a cruise ticket is always governed by general maritime law, not state law. At the outset, we respectfully disagree with the *Schlessinger* holding, *supra*, believing that the court misread the holding of *Carnival Cruise Lines* in that the Supreme Court in *Carnival* did not require that all issues involving suits against cruise lines and issues relating to the passenger ticket be brought in federal court. In addition, in *Carnival* it is important to note that the case was initially brought in Federal Court (then referred to the Washington Supreme Court) and therefore, that case was pled in admiralty. Furthermore, and even if forum selection clauses were reviewed under federal law, the *Schlessinger* case did not have before it the state law claims that the Washington Courts do, nor did *Schlessinger* have before it the **savings to suitors** clause issue, nor the one year time bar from suit. Therefore, *Schlessinger* provides only limited support to the Defendants.

Setting aside the issue of "personal injury" for the moment and focusing on the contract claims only, since this case was filed in Washington state court, Plaintiffs assert that Washington contract law may

(and should) govern the **formation** of this contract.[11] The Supreme Court of Alaska recognized this in its decision, *Nunez v. American Seafoods*, 52 P.3d 720 (AK 2002) (hereinafter "*Nunez*"), where it reversed the Alaskan trial court's decision to dismiss, based upon the Defendant sea food company's argument that the state was an improper forum per the forum selection clause (contained in the contract between the parties). Thus, while the substantive law governing the personal injury claim may be admiralty, Plaintiffs believe that this Court may determine the validity and enforceability of Defendants' cruise ship contract (including the enforceability) under state law.

Under state law formation principles, then, and as set out in Plaintiffs' opening brief, the contract between Jack and Bernice Oltman and the Defendant Cruise Lines may be found unenforceable under Washington State law for a number of reasons, including it being a one way contract of adhesion (which is undisputed), substantively unconscionable (in particular, in providing a one-year limitation provision together with multiple deadlines for reporting of claims against the Defendants (CP 305-307, see Exhibit P), as well as the forum selection clause itself (CP 109) attempting to limit, as Defendants argue, claims to

[11] This is an important distinction as we shall see that the *Carnival, infra* and *M/S Bremen, infra* decisions were premised on federal maritime law – and not State law – because the Parties voluntarily based their claims in Federal law.

federal court only and trials without juries[12] -- and, in this case, attempting to prevent Plaintiffs from having their day in court at all. The Court, under Washington state law could also find that the contract is procedurally unconscionable due to the "the lack of a meaningful choice" before entering it. *Adler v. Fred Lind Manor,* 153 Wash.2d 331, 103 P.3d 773 (Wash. 2004). This is because, in this case, it is undisputed that Jack and Bernice Oltman received their travel documents when they had very little or no time for review (CP 232-33, Decl. of J. Oltman, Ex. A, par. 8-15; and CP 236, Decl. of B. Otlman, Ex B, par. 6).

Last, under the State law causes of action plead by Plaintiffs, Plaintiffs ask that the Court find the contract of adhesion and its forum selection clause and shortened statute of limitations void due to the fraudulent misrepresentations of the Defendants in assuring Plaintiff that the voyage was safe and enjoyable. An assertion that the Defendants did not deny. (CP 26, Defendant's Answer, par. 6). Because, Plaintiffs allege, the Defendants fraudulently induced Plaintiffs to enter into this contract based upon the false misrepresentations and failure to disclose (that there had been at least 863 other cases of gastrointestinal illness aboard the ms. Amsterdam prior to March of 2004 and over a dozen outbreaks (CP 281-285, Exhibit G, CDC report)), the contract is rendered void and the

[12] Generally, there is no common law trial by jury in admiralty cases and thus were this case filed in federal court, the Plaintiffs believe that they would have no right to a jury. *Craig v. Atlantic Richfield, Co.*, 19 F.3d 472 (9th Cir., 1994).

Plaintiffs are excused from performance. *Pedersen v. Bibioff*, 64 Wn. App. 710, 722, 828 P.2d 1113 (1992).

b. Application of Federal Law

If the Washington Court of Appeals chooses to apply federal law to some or all of the issues involved in this case, even then, the result, Plaintiffs assert, is the same – the contract (and forum selection clause) would not be enforceable. The proper test for enforceability of cruise line tickets, and forum selection clauses, in Washington State when applying Federal Law is the Ninth's Circuit's reasonable communicative test (incorporating the US Supreme Court's reasonableness and fairness test as set forth in *Carnival*, *infra*). Under this test, and as set forth in Plaintiffs' opening brief, the ticket must **reasonably communicate** the limiting terms to the passenger so that the passenger can become meaningfully informed of its terms. *Bobbie Jo Wallis v. Princess Cruises, Inc.* provides the best description of this test.[13] (Plaintiffs have attached a copy for the court).

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[13] **[The Ninth Circuit] employ[s] a two-pronged 'reasonable communicativeness' test** . . . to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. . . .**'[T]he 'proper test of reasonable notice is an analysis of the overall circumstances on a case by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake.**" . . . Whether the ticket provides reasonable notice is a question of law. . . .

The **first prong** of the reasonable communicativeness test focuses on the physical characteristics of the ticket. Here we assess ' '[f]eatures such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.' * * *

The contract of adhesion in this particular case fails both prongs of the Ninth Circuit's **reasonable communicative.** First, as to prong one, Plaintiffs assert that the warnings were not conspicuous, and were hidden in a maze of fine print within 30 pages of form contact. Defendants respond by stating that contracts less conspicuous than the present one have been upheld (however, the Defendants have failed to provide this evidence to the trial court below and to the Court on appeal). The present contract also fails prong two as the Plaintiffs did not receive the terms and conditions until either just prior to travel or else at the time of departure. (CP 232, Decl. of J. Oltman, Ex. A, para 9)[14] Thus, there is no dispute that Plaintiffs did not have an opportunity to review the tickets (if there is, then, this would be a material fact in dispute requiring reversal).

As the *Bobbie Jo Wallis* court discusses, the Ninth Circuit's reasonable communicative test is in accord with the U.S. Supreme Court's

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> The **second prong** of the reasonable communicativeness test requires us to evaluate "the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract.' 'The surrounding circumstances to be considered include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket.' This prong allows us to examine more subjective, "extrinsic factors indicating the passenger's ability to become meaningfully informed.'
>
> **We believe the liability limitation at issue fails this second prong.**

Bobbie Jo Wallis v. Princess Cruises, Inc., 306 F.3d 827, 835-836 (9th Cir. 2002) (emphasis added) (hereinafter "*Bobbie Jo Wallis*") (internal citations omitted).

[14] See also Ward v. Cross Sound Ferry, 273 F.3d 520, 2002 AMC 428 (2nd Cir. 2001) (holding that a ticket's contractual terms which were received at the time of boarding did not pass the reasonable communicative test).

decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (hereinafter "*Carnival*" or "*Carnival Cruise Lines*").

As set forth in detail in Appellants' opening brief, the Carnival Court explained the historical context for forum selection clauses, as well as the three rationales behind enforcing them. It is apparent that, in this case, the Defendants have failed the *Carnival* Court's reasoning behind all three rationales, thereby, weighing against a finding in favor of the forum selection clause in this case.

c. The Best Approach: A Mix of Federal and State Law

Importantly, the Massachusetts Court of Appeals, less than one year ago (on June 30, 2005), released a decision which decided nearly the identical issue presented in this case – *Casavant & Another v. Norwegian Cruise Line, LTD.*, 63 Mass.App.Ct. 785 (2005). In *Casavant*, just as in the present case, the defendant cruise line moved to dismiss the plaintiff's action in state court due to a forum selection clause on the reverse side of the passenger ticket which required that any suit be brought in the state of Florida (and therefore, not Massachusetts where the Casavants had brought their suit). After considering the facts, as well as the U.S. Supreme Court's decision in *Carnival*, the Massachusetts Court of Appeals applied **both federal and state** (MA) law to **hold the forum selection clause invalid**.

> The record reflects that Norwegian had not provided information concerning the forum selection clause . . . until . . . **approximately thirteen days before the sail date. . . .**
>
> **Because the manner and means of the delivery of the terms of the contract for passage did not fairly allow the Casavants 'the option of rejecting the contract with impunity', [quoting] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), and because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contact, under controlling Federal maritime law and Massachusetts contractual law, the Florida-dictated forum selection clause is not enforceable. Suit may therefore proceed in the Massachusetts courts.**

Casavant, 63 Mass.App.Ct at 787-789. (emphasis added). In arriving at this holding, the court discussed the U.S. Supreme Court's decision in *Carnival* at great length (this discussion is set out in Appellants' opening brief, and this case is also attached hereto).

2. If the Court finds that the terms are valid and enforceable, then the next step is determining whether or not the Plaintiffs complied with those terms.

A discussion of the Forum Selection Clause

In beginning their proof on Summary Judgment, the Defendants produced the terms and conditions that accompany their passenger cruise ticket.[15] These terms and conditions attempt to limit suits to the State of Washington, either the federal court in Seattle, or the King County courts – in the case that the federal court lacks subject matter jurisdiction.

[15] As discussed in Plaintiffs' opening brief, the terms and conditions produced by the Defendants were not an exact copy of the terms and conditions possessed by the Plaintiffs as, at the very least, the page numbers were not correct.

The Forum Selection clause in the Defendant Cruise Line's ticket reads:

> **ALL DISPUTES** AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISETOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE **SHALL BE LITIGATED IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, OR AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS."**

(CP 109) (emphasis added).

From the clear language of the passage, it reads that cases for which the Federal Court lack subject matter jurisdiction may be filed in King County state court (which the Plaintiffs have). Thus, the million dollar question is whether the federal court had subject jurisdiction.

Since the Washington State Court cannot, as a matter of law, determine the subject matter jurisdiction of the federal court the only way that the Parties and this Court would have ever known if in fact the federal court did have jurisdiction is if the Defendants would have removed this case to Federal Court, which they had the absolute right to. All federal practitioners know this, but the Defendants chose not to do so. Had the Defendants removed this case, then the Federal Court would have had before it the very question that the Defendants now ask this court to decide

– whether the Federal Court had subject matter jurisdiction.

Because this is now a factual question (since it cannot be determined as a matter of law), it is up to the Defendants to prove that there is no material fact in dispute with respect to federal subject matter jurisdiction. In their motion for summary judgment, the Defendants argued (under what appeared to be superseded case law) that cruise ship contracts and voyages sound in admiralty (CP195-204). However, under more recent cases (*Cf Executive Jet Aviation, Inc. v. City of Cleveland* 409 U.S. 249, 93 S.Ct. 493 (1972); *Guidry v. Durkin*, 834 F.2d 1465, 1469-1470 (9th Cir. 1987)), it seems clear that the mere existence of a cruise line ticket is no longer, in and of itself a basis for admiralty jurisdiction – and therefore must be affirmatively proven, which it was not.

In addition Plaintiffs' claims actually sound in state law –alleging negligence and fraud (CP 3-12, Complaint) – and arguing that the Defendants' and their agents fraudulently advertised and misrepresented the safety of the vessels to the Plaintiffs (through mailings, brochures and other advertisements) prior to boarding the ship. (CP 232, Decl. Jack Oltman, par. 7 and CP 26, Defs' Answer, par. 6). The fact that these fraudulent misrepresentations were made on land result in these claims not being admiralty based, but instead being entirely state law based.

If the Defendants were able to prove an admiralty jurisdiction basis

for some of the claims involved, it may not be for all of the claims involved, and even then, subject matter jurisdiction is still not proper in the United States District Court because the "saving to suitors" clause deprives the federal court of the ability to hear the case.

Absent a ground for Removal, the Savings to Suitors Deprives the Federal Court of Jurisdiction

Under the admiralty statute, 28 U.S.C. s. 1333(1), the Saving to Suitors clause provides the affirmative right to Plaintiffs to choose a state court forum to adjudicate their claims, even though they may also be admiralty and maritime in nature. The statute provides, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the state, of: (1) Any civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled**." 28 U.S.C. s. 1333(1). It is this clause that deprives the federal court of jurisdiction and permits Plaintiffs to choose a state court forum for their claims (regardless of whether they reside in state law or admiralty). The forum selection clause at issue in this case does not bar the Plaintiffs from utilizing the Savings to Suitors clause to deprive the federal court of jurisdiction.

As discussed above, the only way for this Court (and the trial court) to know for certain (and as a matter of law) is for the Federal Court to have determined whether or not jurisdiction existed on removal.. See 28

U.S.C. s. 1441(a)." *Little et al. v. RMC Pacific Materials, Inc. et al*, 2005 U.S. Dist. LEXIS 14338, pg 3.

> Courts have consistently held that the "saving to suitors" clause prohibits a defendant from removing a case that has been brought in state court absent an alternative jurisdictional basis such as diversity. . . .**a purely maritime claim cannot be removed by a defendant alleging that application of federal maritime invokes federal question jurisdiction under § 1331.** *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 148 L. Ed. 2d 931, 121 S. Ct. 993 (2001)

Id. at 4-5. (internal citations omitted) Thus, the Defendants' simple assertion that the case involves "maritime and admiralty jurisdiction" is not enough to prove subject matter jurisdiction when the case has been filed in state court under the savings to suitors clause.

So long as there does not exist a separate basis for subject matter jurisdiction (such as diversity or federal question which there is absolutely not in this case), a case removed must be remanded for lack of subject matter jurisdiction. *See Auerback, supra, and Mangual-Saez v. Brilliant Globe Logistics*, 2004 U.S. Dist. Lexis 27003 at pg 12 (D.C. P.R. 2004). And, Plaintiffs believe that the Defendants did not attempt remove this case to Federal Court because the Defendants knew that this case would be remanded to the state court for lack of subject matter jurisdiction. Consider the Supreme Court's directive,

It appears that the Defendants are continuing to argue that their forum selection clause takes away Plaintiffs' option to file their claims

under the Savings to Suitors Clause. However, Defendants do not and indeed cannot cite any supporting case law or statute that would give them the authority to override 28 U.S.C.A. §1333 (1) and deprive the Plaintiffs of their fundamental right to a fair trial by a jury guaranteed by the Seventh Amendment. Certainly Carnival Cruise does not confer such broad authority. Interpreting this or any other case dealing with forum selection clauses in a way that would deny a jury trial to the Plaintiffs in this case is contrary to the public policy expressed by the U.S. Constitution itself, rendering the forum selection clause at issue unconstitutional. If the Supreme Court intended for their ruling in Carnival to have any effect on the Savings to Suitors clause, it would have mentioned it at least once.

This case should be reversed and remanded to the trial court for further proceedings and further discovery.

Dated this 23rd Day of March, 2006.

IN PACTA, PLLC.

Noah Davis, WSBA #30939
Roman Kesselman, WSBA #35595
Attorneys for Plaintiffs/Appellants

Appendix A

Select Important Cases

273 F.3d 520, *; 2001 U.S. App. LEXIS 26345, **;
2002 AMC 428

1 of 1 DOCUMENT

DEBRA WARD, Plaintiff-Appellant, v. CROSS SOUND FERRY, Defendant-Appellee.

Docket No. 01-7502

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

273 F.3d 520; 2001 U.S. App. LEXIS 26345; 2002 AMC 428

November 2, 2001, Argued
December 10, 2001, Decided

PRIOR HISTORY: [**1] Plaintiff-appellant Debra Ward appeals from the March 29, 2001 judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, District Judge) granting summary judgment to defendant-appellee Cross Sound Ferry and dismissing Ward's complaint as time-barred.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff injured passenger sued defendant ferry operator for personal injuries from a slip and fall on the gangway as she was boarding the operator's boat. The passenger appealed from the judgment of the United States District Court for the Eastern District of New York granting summary judgment to the operator and dismissing the complaint as time-barred.

OVERVIEW: The operator sought to enforce a contractual time limitation appearing on the back of the passage ticket that required suits to be filed within one year of an injury. The passenger's husband obtained her ticket just two to three minutes before boarding the ferry. On boarding, the operator collected the tickets. The operator did not dispute that it typically issued tickets just prior to boarding and collected them upon boarding. The court of appeals found that possession of the ticket for such a short period of time was insufficient to give the passenger reasonable notice that the ticket contained important contractual limitations. Indeed, the fact that the operator collected the tickets so quickly after providing them to the passenger tended to negate the idea that the tickets were important contractual documents. The district court improperly (1) confused the question of reasonable communication with the less important question whether it was possible to read the ticket in the time provided, and (2) shifted the burden to the passenger to learn, after the fact, if notice had been given, rather than determining whether the operator had given reasonable notice in the first place.

OUTCOME: The court of appeals reversed the district court's grant of summary judgment for the operator, and remanded for further proceedings.

CORE TERMS: ticket, passenger, boarding, carrier, reasonable notice, two-part, minute, collected, ferry, communicated, contractual, trip, ample opportunity, notice, time limitation, contractual limitation, contractual terms, summary judgment, ample time, duplicate, amount of time, legal rights, enforceable, communicate, cruise, ship, sea, reverse side, ticket collector, gangway

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] A court of appeals reviews the district court's grant of summary judgment de novo, including the issue of whether a passage ticket "reasonably communicated" contractual limitations imposed by the sea carrier, which is a question of law for the court.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN2] *46 U.S.C.S. § 183b*(a) permits a sea carrier to contractually limit the time period in which a suit for injuries may be filed by passengers, provided that time period is at least one year. The only restriction to enforcement of such limitations is that the carrier "reasonably communicate" the existence and importance of the limitation to the passenger.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN3] In the context of water transportation, a contractual limitation on a carrier's liability is not enforceable unless the carrier satisfies its burden of showing that it had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights. Thus, sea carriers must reasonably communicate any limitations period to their passengers. In applying this standard, a two-part test is employed: (1) whether the physical characteristics of the ticket itself reasonably communicated to the passenger the existence therein of important terms and conditions that affected the passenger's legal rights, and (2) whether the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract permitted the passenger to become meaningfully informed of the contractual terms at stake.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN4] Given the likelihood that a passenger will not read the fine print upon purchase or during a pleasure cruise, the surrounding circumstances examined in the second part of the test for effectiveness of a sea carrier's limitation of liability provision in the tickets it issues may be of equal importance as the prominence of warnings and clarity of conditions examined in the first part of the test in deciding whether a provision should be held to bind a particular passenger, since the same passenger might very well be expected to consult the multifarious terms and conditions of the ticket/contract in the event of an accident resulting in a loss or injury.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN5] For notice of a water carrier's limitation of liability provision to be reasonable, it must warn the passenger that the terms and conditions were important matters of contract affecting the passenger's legal rights.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN6] The provisions of a ticket issued by a water carrier are not binding unless the ticket is given to the passenger within such a time as to give him an ample opportunity to examine its contents, and it is shown that he knew or had reason to know of the contract terms' existence.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN7] The second part of the test for effectiveness of a sea carrier's limitation of liability provision in the tickets it issues focuses on the subjective circumstances attending a particular plaintiff's opportunity to review the ticket terms before embarkation. Such factors include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice the passenger received outside of the ticket.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN8] The test for effectiveness of a sea carrier's limitation of liability provision in the tickets it issues requires a case-by-case determination, and differing circumstances may render the same ticket binding on one passenger, yet invalid as against another passenger.

Transportation Law > Water Transportation > Personal Injury & Property Damage

[HN9] Giving a passenger on a water carrier a ticket that is collected two to three minutes later does not sufficiently notify the passenger that the ticket contains important contractual terms such that the passenger, or her lawyer, would be expected to obtain a duplicate ticket in the event of an injury.

COUNSEL: BRIAN W. McELHENNY, Esq., Curtis, Vasile, Devine & McElhenny, Merrick, NY, for Plaintiff-Appellant.

ALFRED J. WILL, Esq., Badiak Will & Ruddy, LLP, New York, NY, for Defendant-Appellee.

JUDGES: Before: WALKER, Chief Judge, POOLER and KATZMANN, Circuit Judges.

OPINIONBY: JOHN M. WALKER, JR.

OPINION: [*521]
JOHN M. WALKER, JR., Chief Judge:

Plaintiff-appellant Debra Ward, a resident of New York, appeals from the March 29, 2001 judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, District Judge) granting summary judgment to defendant-appellee Cross Sound Ferry ("CSF"), a Connecticut company, and dismissing Ward's complaint as time-barred.

On June 23, 1997, Ward fell and injured herself on a gangway while boarding a CSF ferry in New London, Conn., bound [*522] for Orient Point, N.Y. Although Ward's counsel sent a claim letter to CSF within a month

of the [**2] injuries, no suit was filed until November 1999, some two-and-a-half years after the accident.

After removing the case from state court to federal court on the basis of diversity and admiralty jurisdiction, CSF moved in the district court for summary judgment on the ground that the suit was time-barred. Although a statutory limitations period of three years would otherwise apply to the case, see *46 U.S.C. § 763a,* CSF sought to enforce a contractual time limitation appearing on the back of the passage ticket that required suits to be filed within one year of an injury. A ticket identical to the one received by plaintiff was submitted with CSF's motion. The front of that ticket, which measures about two inches by three-and-a-half inches, reads as follows:

> Cross Sound Ferry
>
> Ticket Good on Date of Issue Only Contract: Subject to Terms on Reverse Side
>
> "Cross Sound Ferry" at the top appears to be in fifteen-point bold Times New Roman type and "Ticket Good on Date of Issue Only / Contract: Subject to Terms on Reverse Side" on the bottom appears to be in twelve-point bold Times New Roman type. The writing on the reverse side of the ticket appears to [**3] be in seven-point Arial type and reads as follows:
>
> Terms of Passage Contract Between the Ferry, its Owners and their Employees and Concessionaires ("The Carrier") and passenger: (1) By accepting this contract passenger agrees to its terms. (2) Contract not transferable and valid and refundable only on day issued. (3) Carrier's liability for loss or damage to vehicles or personalty is limited to $ 500. (4) Carrier is not liable for loss of or damage to vehicles or personalty, or for personal injuries, illnesses or death, unless written notice is given to Owners within six months of the date of the occurrence, and suits on all such claims shall not be maintainable unless commenced within 1 year after the occurrence. (5) All disputes in any way connected with this contract must be litigated in a State Court of New London County, or in the U.S. District Court of Connecticut, Ticketed Vehicles must remain in staging area until boarding. Ferry passage may be denied at the discretion of the "Carrier".

It is undisputed that plaintiff's husband obtained both her ticket and his just two to three minutes before boarding the ferry. Plaintiff, after falling on the gangway, was carried [**4] on board by her husband, who simultaneously handed the tickets for both husband and wife to the ticket collector. CSF does not dispute that it typically issues tickets just prior to boarding and collects them upon boarding, and that plaintiff's possession of the tickets for a total of only two to three minutes is not unusual.

Following oral argument on the motion, the district court issued its decision from the bench. Relying on various cases, the district court reasoned that plaintiff had ample time to read the ticket's terms before handing it to the ticket collector while boarding, and that she had ample opportunity to obtain a duplicate ticket after the injury if she had not read the ticket or could not remember its contractual terms. Concluding that Ward's attorney "presumably dropped the ball" in failing to get a duplicate copy of the ticket, the district court upheld the contractual limitation, granted summary judgment for CSF, and dismissed plaintiff's complaint. This appeal followed.

[*523] DISCUSSION

[HN1] We review the district court's grant of summary judgment *de novo*, including the issue of whether a passage ticket "reasonably communicated" contractual limitations imposed by [**5] the sea carrier, which is a question of law for the court. See *Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d Cir. 1995).* Jurisdiction in the district court was properly based on admiralty. See *Kenward v. The Admiral Peoples, 295 U.S. 649, 651-52, 79 L. Ed. 1633, 55 S. Ct. 885 (1935)* (holding that admiralty jurisdiction applied to injury that occurred on gangplank leading to ship).

The issue of whether time limitations appearing on a passenger ticket are enforceable is one that arises with surprising regularity, although the particular facts of this case -- namely, possession of the ticket for only a few minutes -- are seemingly unique. Title [HN2] *46 U.S.C. § 183b*(a) permits a sea carrier to contractually limit the time period in which a suit for injuries may be filed by passengers, provided that time period is at least one year. See *46 U.S.C. § 183b*(a). The only restriction to enforcement of such limitations is that the carrier "reasonably communicate" the existence and importance of the limitation to the passenger. See *Spataro v. Kloster Cruise, Ltd., 894 F.2d 44, 45-46 (2d Cir. 1990)* [**6] (per curiam). The "reasonably communicate" standard devolved from Judge Friendly's seminal opinion in *Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11, 17 (2d Cir. 1968),* in which he found, based on his review of the case law, that [HN3] a contractual limi-

tation would not be enforceable unless the carrier satisfied its burden of showing that it "had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." Most circuits, including ours, have since construed Silvestri as requiring that "sea carriers reasonably communicate any limitations period to their passengers." *Spataro, 894 F.2d at 46.*

In applying this standard, several circuits have adopted a two-part test: (1) whether the physical characteristics of the ticket itself "reasonably communicated to the passenger the existence therein of important terms and conditions" that affected the passenger's legal rights, and (2) whether "the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract" permitted the passenger "to become meaningfully informed of the contractual [**7] terms at stake." *Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 864-66 (1st Cir. 1983);* see also *Dillon v. Admiral Cruises, Inc., 960 F.2d 743, 744-45 (8th Cir. 1992).* As the court in Shankles noted, [HN4] given the likelihood that a passenger will not read the fine print upon purchase or during a pleasure cruise, the surrounding circumstances examined in the second part of the test "may be of equal importance as the prominence of warnings and clarity of conditions [examined in the first part] in deciding whether a provision should be held to bind a particular passenger," since "the same passenger might very well be expected to consult the multifarious terms and conditions of the ticket/contract in the event of an accident resulting in a loss or injury." *722 F.2d at 865.*

The Second Circuit has never discussed, much less adopted, the two-part test, perhaps because the second part has never been at issue. See, e.g., *Effron, 67 F.3d at 8* (noting that plaintiff purchased ticket one month before cruise); *Spataro, 894 F.2d at 46* (omitting discussion of when plaintiff received ticket or whether plaintiff [**8] retained possession, but language of ticket indicated that plaintiff received tickets in advance of arrival for the cruise). In the [*524] instant case, however, plaintiff conceded that there was no dispute with respect to the first part of the test because the physical characteristics of the passenger ticket reasonably communicated the existence and importance of the contractual terms of passage. Thus, plaintiff's success depends entirely on whether we adopt the second part of the test and apply it in her favor.

Several district courts in this circuit have employed the two-part test, reasoning that it is used widely among other circuits and is not inconsistent with our circuit's approach. See, e.g., *Ames v. Celebrity Cruises, Inc., 1998 U.S. Dist. LEXIS 11559,* Dkt. No. 97 Civ. 0065(LAP), *1998 WL 427694,* at *4 & n.7 (S.D.N.Y. July 29, 1998) (applying two-part test and noting its widespread use); *Boyles v. Cunard Line Ltd., 1994 U.S. Dist. LEXIS 21449,* Dkt. No. 93 Civ. 5472(CES), *1994 WL 449251,* at *2 & n.6 (S.D.N.Y. Jan. 11, 1994) (applying two-part test on reasoning that, although not explicitly adopted by Second Circuit, test is not inconsistent with this circuit's decisions); *Lieb v. Royal Caribbean Cruise Line, Inc., 645 F. Supp. 232, 234 (S.D.N.Y. 1986).* [**9] The district court below also applied the two-part test, finding that it could be "harmonized" with the test applied by the Second Circuit. We believe the two-part test to be useful in analyzing the reasonably communicated standard and to be a satisfactory refinement of Judge Friendly's holding in Silvestri, and therefore, take this opportunity to expressly adopt it.

Applying the test's second part to the facts of this case, we must decide whether a carrier gives reasonable notice of contractual limitations when it issues a ticket bearing the terms of the limitations to the passenger just minutes before she boards the ship and then collects the entire ticket at boarding, thereby leaving her with no written notice of the terms or even that such terms exist.

As the district court below noted, in the majority of cases in which a time limitation contained on a passenger ticket has been upheld, the court's decision rested in part on the fact that the passenger or the passenger's agent received the ticket several days in advance of the trip and was allowed to retain the ticket (or at least that portion of the ticket containing the contract terms and conditions) either permanently or [**10] for a substantial period of time after boarding the ship. See, e.g., *Dillon, 960 F.2d at 744-45* (upholding limitation where plaintiff purchased ticket at least one week before trip and her attorney retained ticket after injury); *Marek v. Marpan Two, Inc., 817 F.2d 242, 243-44 (3d Cir. 1987)* (upholding limitation where plaintiff received ticket just before boarding and one page of ticket collected upon boarding, but analyzing only portions of ticket retained by the passenger to determine reasonable communicativeness); *Shankles, 722 F.2d at 866* (upholding limitation in part because plaintiff had ticket before boarding and retained it after the fire that caused her losses).

In some cases it is unclear whether the passenger was allowed to retain the ticket, while in others the passenger specifically sought to avoid the terms because the ticket was collected upon boarding. In each of these cases, however, enforcement of the ticket's terms was upheld in part because the passenger had received the ticket several days in advance of boarding and thus had ample time to read it. See, e.g., *Effron, 67 F.3d at 8* [**11] (upholding forum selection clause where plaintiff purchased ticket one month in advance); *Foster v. Cunard White Star, 121 F.2d 12, 13 (2d Cir. 1941)* (per curiam) ("Plaintiff is charged with notice [of time limitation] . . . since her brother . . . [had ticket] for some sev-

enteen days before the voyage."); *Colby v. Norwegian Cruise Lines, Inc., 921 F. Supp. 86, 88* [*525] *(D. Conn. 1996)* (holding that even though ticket was surrendered upon boarding, plaintiff was deemed to have reasonable notice of forum selection clause because plaintiff had ticket "for a period of time"); *Murray v. Cunard S.S. Co., 235 N.Y. 162, 166, 139 N.E. 226 (1923)* (Cardozo, J.) (holding that fact that ticket was collected upon boarding did not help plaintiff in fighting time limitation because he "held [the ticket] several days with ample time to read it"). Notably, in each of these cases, the amount of time the passenger had to examine the ticket was critical to the decision to uphold the contractual limitation.

No case cited by the parties or the district court involved the rare situation presented in this case: one in which the passenger's possession of [**12] the ticket is limited to two to three minutes as a result of the carrier's own practices. The district court, nevertheless, held that the clause here was enforceable because it took less than a minute to read and, therefore, Ward -- or her husband acting as her agent -- had adequate time to read it before boarding the ferry. The district court went on to state that, even if Ward had not read the ticket before boarding, she had ample opportunity to obtain a duplicate ticket after the accident and her attorney "presumably dropped the ball" by failing to do so.

In our view, the district court's reasoning is flawed because it confuses the significant question of whether CSF reasonably communicated to passengers that the ticket contained important terms and conditions, given the amount of time CSF allowed passengers to possess the tickets, with the less important question of whether it was possible to read the ticket in the amount of time provided. See *Silvestri, 388 F.2d at 17.*

We find that possession of the ticket for such a short period of time was insufficient to give Ward reasonable notice that the ticket contained important contractual limitations. Indeed, the [**13] fact that CSF collected the tickets so quickly after providing them to the passenger tended to negate the idea that the tickets were important contractual documents. See *Silvestri, 388 F.2d at 17* (holding that [HN5] for notice to be reasonable, it must "warn the passenger that the terms and conditions were important matters of contract affecting [the passenger's] legal rights"); *Carpenter v. Klosters Rederi A/S, 604 F.2d 11, 13 (5th Cir. 1979)* (holding that [HN6] a ticket is not binding unless it is given to the passenger "within such a time as to give him an ample opportunity to examine its contents" and "it is shown that he knew or had reason to know of [the contract terms'] existence" (internal quotation marks omitted).

As the district court in Ames stated, moreover, [HN7] the second part of the test "focuses on the subjective circumstances attending a particular plaintiff's opportunity to review the ticket terms before embarkation. Such factors include 'the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice the passenger received outside of the ticket.'" *Ames, 1998 U.S. Dist. LEXIS 11559, 1998 WL 427694,* [**14] at *5 (quoting *Boyles, 1994 U.S. Dist. LEXIS 21449, 1994 WL 449251,* at *3) (internal citation omitted). In this case, the circumstances surrounding Ward's purchase and subsequent retention of the ticket are that her husband entered the terminal building and purchased the ticket two to three minutes prior to boarding, then proceeded across the parking lot to board the ferry with Ward. Ward fell on the gangway while boarding and had to be carried on board by her husband, who handed the tickets to [*526] the ticket collector in the process. Under these circumstances, even if Ward or her husband might otherwise have had ample opportunity and incentive to inspect the tickets, both she and her husband would certainly have been distracted from studying the ticket's provisions. See *Shankles, 722 F.2d at 864* (noting that [HN8] test requires a "case-by-case determination," and that "differing circumstances may render the same ticket binding on one passenger . . .,yet invalid as against another passenger").

The district court relied on several cases for the proposition that Ward had ample opportunity to obtain a duplicate ticket after the trip. We find those cases to be distinguishable because in each [**15] of them the passengers had received their original tickets well in advance of the trip, and thus the carrier had satisfied its burden of providing reasonable notice. In Ames, for example, the district court found that as a matter of law the carrier had given reasonable notice because plaintiffs' possession of the tickets for "two or three days [before the trip] provided plaintiffs with a reasonable amount of time to peruse and familiarize themselves with the time limitations affecting their right to sue." *Ames, 1998 U.S. Dist. LEXIS 11559, 1998 WL 427694,* at *5; see also id. at *5 n.10. Although the district court then went on to state that the plaintiffs "had a duty at [the] time [of injury] to consult their tickets or to contact [the Defendant] in order to learn of any limitations affecting their right to sue," id. at *5, we read this statement as implicitly holding that plaintiff's duty to contact the defendant did not arise until defendant had satisfied its obligation to give reasonable notice.

Similarly in Murray, also relied upon by the district court here, Judge Cardozo stated that where the ticket was collected upon boarding, plaintiff could have obtained a copy [**16] of his ticket after the accident. *Murray, 235 N.Y. at 166.* But, as with Ames, the court in

Murray had already held that reasonable notice had been satisfied because the plaintiff "held [the ticket] several days with ample time to read it." Id.

Other cases in which a court stated that plaintiff could have contacted the carrier after the injury to learn if any limitations applied did not involve a situation where the carrier collected the ticket at boarding. In those cases, the plaintiff had either discarded or lost the ticket, or had not retained all pages of the ticket after boarding. For example, in *Kendall v. Am. Haw. Cruises, 704 F. Supp. 1010, 1016-18 (D. Haw. 1989),* plaintiffs had received the ticket before boarding and retained it afterward. The time limitations, however, were contained on page eight of the ticket, which plaintiffs alleged was missing from their copy. *Id. at 1017.* The district court noted that while this fact "clearly is significant," reasonable notice had nevertheless been established because two pages that plaintiffs admittedly received and retained alerted them that time limitations existed [**17] and that they were located on page eight. *Id. at 1016-17.* Thus, plaintiff was held to be on notice to obtain another copy of that page. Id.

In light of the rationale employed in these other cases, we do not think that [HN9] giving a passenger a ticket that is collected two to three minutes later sufficiently notifies the passenger that the ticket contains important contractual terms such that the passenger, or her lawyer, would be expected to obtain a duplicate ticket in the event of an injury. The district court's reasoning that the lawyer "presumably dropped the ball" improperly shifted the burden to Ward to learn if notice had been given, rather than determining whether CSF had given reasonable notice in the first place.

As a practical matter, moreover, denying enforcement of the contractual limitation [*527] here does not place an unreasonable burden on CSF. No reason has been advanced why, for example, CSF could not give passengers a two-part ticket and then collect only the part that does not contain the contract terms.

Accordingly, we reverse the district court's grant of summary judgment for defendants and remand for further proceedings not inconsistent with this [**18] opinion.

Supreme Court of Washington,
En Banc.
Kathleen M. GREEN and Joshua Green IV, wife and husband, Respondents,
v.
A.P.C. (AMERICAN PHARMACEUTICAL CO.); Kirkman Laboratories, formerly Kirkman Pharmaceutical Co.; Eli Lilly & Company; E.R. Squibb & Sons; and Stanlabs, Petitioners.
No. 65641-0.
Argued May 20, 1998.
Decided Aug. 20, 1998.

Products liability action was brought against manufacturers of pregnancy drug diethylstilbestrol (DES). The Superior Court, King County, Laura Inveen, J., granted defense motion for summary judgment on limitations grounds, and appeal was taken. The Court of Appeals, 86 Wash.App. 63, 935 P.2d 652, reversed. Granting review, the Supreme Court, Talmadge, J., held that: (1) question of material fact existed as to whether plaintiff who alleged she had T-shaped uterus as result of her mother's ingestion of DES should have discovered that condition three years before she filed action, precluding summary judgment for manufacturers on limitations grounds; (2) in toxic exposure cases, there is no absolute bar to **loss** of **consortium** claims arising from premarital injuries if the spouse asserting claim could not know of the harm at time of marriage; and (3) husband's **loss** of **consortium** claim accrued when he first experienced injury due to **loss** of **consortium.** Judgment of Court of Appeals affirmed; case remanded.

West Headnotes

[1] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

30 Appeal and Error KeyCite Notes
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases

On appeal from summary judgment, Supreme Court engages in the same inquiry as the trial court; it reviews motion de novo, treating all facts and inferences therefrom in a light most favorable to the nonmoving party. CR 56(c).

[2] KeyCite Notes

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

Under "discovery rule," a cause of action for personal injuries does not accrue until a party knew or should have known the essential elements of the cause of action: duty, breach, causation, and damages.

[3] KeyCite Notes

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(1) k. In General; What Constitutes Discovery. Most Cited Cases

Discovery rule for accrual of a cause of action does not require a plaintiff to understand all the legal consequences of the claim.

[4] KeyCite Notes

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(2) k. Want of Diligence by One Entitled to Sue. Most Cited Cases

Generally, for purposes of discovery rule, when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, plaintiff must make further diligent inquiry to ascertain scope of the actual harm; plaintiff is charged with what a reasonable inquiry would have discovered.

[5] KeyCite Notes

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k43 k. Causes of Action in General. Most Cited Cases

Running of the statute of limitations is not postponed until the specific damages for which the plaintiff seeks recovery actually occur.

[6] KeyCite Notes

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(5) Matters Affecting Right to Judgment
228k181(7) k. Bar of Statute of Limitations. Most Cited Cases

Question of material fact existed as to whether woman alleging she had T-shaped uterus as result of her mother's ingestion of pregnancy drug diethylstilbestrol (DES) should have discovered that condition three years before she filed product liability action against manufacturers, precluding summary judgment for manufacturers on statute of limitations grounds. West's RCWA 4.16.080(2),

7.72.060(3).

[7] KeyCite Notes 

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(2) k. Particular Defenses. Most Cited Cases

Declarations by counsel for manufacturer of pregnancy drug diethylstilbestrol (DES), in briefs supporting motion for summary judgment, that daughter of woman who took DES should have discovered her T-shaped uterus over three years prior to filing products liability action did not constitute evidence that action was barred on limitations grounds; declaration to that effect from a qualified health professional was needed. West's RCWA 4.16.080(2), 7.72.060(3).

[8] KeyCite Notes 

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k114 k. In General. Most Cited Cases

Argument of counsel does not constitute evidence.

[9] KeyCite Notes 

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k199 Questions for Jury
241k199(1) k. In General. Most Cited Cases

Question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is ordinarily a question of fact.

[10] KeyCite Notes 

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Party moving for summary judgment bears initial burden of showing the absence of an issue of material fact. CR 56(c).

[11] KeyCite Notes 

205 Husband and Wife
205VI Actions

205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases

Husband could bring action for loss of consortium in connection with wife's T-shaped uterus, even though wife's injury, resulting from her mother's ingestion of pregnancy drug while wife was in utero, occurred prior to the marriage; husband's cause of action was a separate and independent claim that did not accrue until he first experienced injury due to loss of consortium.

[12] KeyCite Notes

205 Husband and Wife
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases

205 Husband and Wife KeyCite Notes
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(4) k. Personal Injuries to Husband. Most Cited Cases

Washington recognizes **loss** of **consortium** as a separate, not derivative, claim; thus, spouse's cause of action for **loss** of **consortium** accrues when he or she first experiences injury due to **loss** of **consortium,** regardless of when other spouse's injury claim accrues.

[13] KeyCite Notes

205 Husband and Wife
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases

205 Husband and Wife KeyCite Notes
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(4) k. Personal Injuries to Husband. Most Cited Cases

In toxic exposure cases, there is no absolute bar to loss of consortium claims arising from premarital injuries if the spouse asserting claim could not know of the harm at time of marriage.
***913 *90** Helsell, Fetterman, Martin, Todd & Hokanson, Karen J. Vanderlaan, Fallon & McKinley, Nancy McKinley, Williams, Kastner & Gibbs, Douglas A. Hofmann, Jan Kirkwood, Seattle, Shook, Hardy & Bacon, David W. Brooks, Kansas City, MO, for Petitioners.
Messina Law Firm, Stephen Bulzomi, John Messina, De Costa Law Firm, Virginia L. De Costa, Tacoma, for Respondents.

Lane, Powell, Spears & Lubersky, Michael King, Linda Clapham, Seattle, Amicus Curiae on behalf of Washington Defense Trial Lawyers.
Harbaugh & Bloom, Gary Bloom, Bryan P. Harnetiaux, Debra Stephens, Spokane, Amicus Curiae on behalf of Washington State Trial Lawyers Association.
***91** Schroeter, Goldmark & Bender, Janet L. Rice, William J. Rutzick, Mark Leemon, Kristin M. Houser, Sandra E. Widlan, Seattle, Amicus Curiae on behalf of Schroeter, Goldmark & Bender.

TALMADGE, Justice.
We are asked in this case to decide if distinct statutory limitations periods apply to putatively separate and distinct injuries arising from exposure to toxic products. We reaffirm the basic rule that for purposes of the statute of limitations a cause of action claiming harm from exposure to a toxic product accrues when the plaintiff knew or should have known the essential elements of the claim. As to the harm element of a claim, the plaintiff's action accrues ordinarily upon awareness of some appreciable injury caused by the exposure to the defendant's toxic product even if the full extent of the harm is unknown. The plaintiff is also charged with exercising due diligence to learn of the claim; if the plaintiff fails to exercise due diligence, he or she is charged with the knowledge due diligence would have revealed.
In this case, we affirm the Court of Appeals, which reversed the trial court's order on summary judgment because of the lack of any evidence in the record regarding what Kathleen Green discovered, or could have discovered, prior to 1992 regarding a possible diagnosis of a T-shaped uterus arising out of her mother's ingestion of DES (diethylstilbestrol). We also affirm the Court of Appeals' reversal of the trial court's summary dismissal of Joshua Green's loss of consortium claim. We remand the case to the trial court for further proceedings consistent with this opinion.

****914 *92 ISSUES**

1. Does the statute of limitations bar the Greens' claim because Kathleen knew or should have known, more than three years before she filed the present action, of her T-shaped uterus?
2. Has Mr. Green stated a claim for loss of consortium?

FACTS

DES was prescribed between 1947 and 1971 to prevent miscarriages and other types of prenatal accidents. [FN1] As of 1966, Kathleen Green's mother, Joanne McCutchen, a nurse, had a 10-year history of pregnancy loss due to such prenatal accidents. When she became pregnant with Kathleen, her obstetrician prescribed DES. Kathleen was born on April 28, 1967. Kathleen concedes she understood by age 14 she was "a DES daughter."

> FN1. The history of DES and its toxic effect on the children of the women who ingested it are described in *Martin v. Abbott Lab.*, 102 Wash.2d 581, 689 P.2d 368 (1984), and *George v. Parke-Davis*, 107 Wash.2d 584, 733 P.2d 507 (1987).

In 1981, a doctor diagnosed Kathleen with having what he called a cockscomb or hooded cervix. A cockscomb cervix is a change caused by DES exposure. Kathleen says she had no idea at the time what that meant, but knew that because she was a DES daughter she needed careful monitoring of her condition by frequent pap smears.
In 1986, when she was 19, Kathleen had an abnormal pap smear, revealing a cervical problem. Her doctor performed a colposcopy and biopsies. She subsequently underwent cryosurgery for a precancerous condition and had acid treatments to prevent spreading of the precancerous cells. The treatment was successful. Kathleen understood then that her condition was due to DES exposure. She asserts, however, she "had no idea that DES would impact my reproductive capabilities." Clerk's Papers at 228. Kathleen married Joshua Green IV in June 1988.
***93** Ms. Green claims she first learned of the potential for DES-caused reproductive problems after she visited her current counsel, John Messina, in the fall of 1991. Messina informed her she may have other damage due to DES. Evidently in response to Messina's information about the possibility of other DES consequences, she underwent a hysterosalpingogram (HSG), an X-ray procedure, in January 1992, which revealed her T-shaped uterus. [FN2]

FN2. The parties have not provided specific medical expert testimony discussing the medical consequences of this condition.

Ms. Green became pregnant in the summer of 1994. In November 1994, she went into premature labor and was confined to her bed with medication and home uterine contraction monitoring. She was hospitalized several times during her pregnancy, but delivered a normal 7 lb., 6 oz. boy, Joshua Green V, by cesarean section on March 27, 1995. Ms. Green's postoperative course was normal, and she was discharged from the hospital three days later. As the baby's due date was April 15, 1995, he was 19 days premature.

The Greens filed the present lawsuit on September 27, 1994, after Ms. Green had been pregnant for approximately three months. They named five defendants, all pharmaceutical companies: American Pharmaceutical Company, Kirkman Laboratories, Eli Lilly & Company, E.R. Squibb & Sons, and Stanlabs (collectively, Eli Lilly). The Greens alleged strict liability, negligence, and failure to warn, and sought damages for the cockscomb cervix, the constant monitoring of her condition by pap smears, the colposcopy and biopsies, the cryosurgery and acid treatments, and problems with the birth of their child. Mr. Green alleged loss of consortium.

After conducting discovery, Eli Lilly, joined by the other defendants, moved for summary judgment in November 1995. Eli Lilly based its motion for dismissal on the statute of limitations, arguing the Greens knew or should have ***94** known of the injuries they complained of more than three years prior to the time the Greens filed suit. Eli Lilly also argued Mr. Green's **loss** of **consortium** claim failed because no **loss** of **consortium** claim exists for premarital torts. In the ****915** course of resisting the defendants' motion, the Greens conceded that all of Ms. Green's claims except those pertaining to her T-shaped uterus were time-barred. The trial court granted the motions for summary judgment dismissing the Greens' action against the defendants. The trial court also dismissed Mr. Green's loss of consortium claim.

On appeal, Division One of the Court of Appeals reversed in a published opinion, finding that separate statutory limitations periods were applicable for the "separate and distinct" injuries to Kathleen Green from her mother's DES ingestion. The court found questions of fact present as to when the statute of limitations accrued for each of the distinct injuries to Ms. Green and Mr. Green's loss of consortium claim. *Green v. A.P.C.*, 86 Wash.App. 63, 935 P.2d 652 (1997). We granted review.

ANALYSIS

A. Standard of Review for Summary Judgment

[1] On appeal from summary judgment, we engage in the same inquiry as the trial court. *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 668, 911 P.2d 1301 (1996). We review the motion for summary judgment de novo, and treat all facts and inferences therefrom in a light most favorable to the nonmoving party. *Fell v. Spokane Transit Auth.*, 128 Wash.2d 618, 625, 911 P.2d 1319, (1996). If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, we uphold summary judgment. CR 56(c).

B. Statute of Limitations and the Discovery Rule

The parties here ask us to apply "the statute of limitations" to the Greens' claims, and, yet, they do not tell us if the applicable statute is RCW 4.16.080(2), the general statute ***95** for negligence claims, or RCW 7.72.060(3), the statute for claims under Washington's product liability and tort reform act of 1981. Both statutes employ different language regarding the accrual of claims, but the parties apparently agree that there is no difference in the outcome of this case if either statute applies.

[2] [3] RCW 4.16.080(2) limits to three years a person's ability to file a claim for injuries. However, under Washington's discovery rule, a cause of action does not accrue until a party knew or should have known the essential elements of the cause of action--duty, breach, causation, and damages. *Ohler v. Tacoma Gen. Hosp.*, 92 Wash.2d 507, 598 P.2d 1358 (1979), *superseded by statute as stated in Wood v. Gibbons*, 38 Wash.App. 343, 685 P.2d 619 (1984); *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash.2d 550, 663 P.2d 473 (1983); *In re Estate of Hibbard*, 118 Wash.2d 737, 826 P.2d 690 (1992); *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992). The discovery rule does not require a plaintiff to understand all the legal consequences of the claim. As we said in *Reichelt v. Johns-Manville Corp.*, 107 Wash.2d 761, 772, 733 P.2d 530 (1987):

Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law.

In enacting RCW 7.72.060(3), the Legislature provided that a cause of action under RCW 7.72 accrued when the injured party "discovered or in the exercise of due diligence should have discovered the harm and its cause." *See* *North Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wash.2d 315, 759 P.2d 405 (1988).

Regardless of whether RCW 4.16.080(2) or RCW 7.72.060(3) is applied here, [FN3] a cause of action may accrue for purposes of the statute of limitations if a party *should have* discovered salient facts regarding a claim. *See, e.g.,* ***96** *Gevaart v. Metco Constr., Inc.*, 111 Wash.2d 499, 502, 760 P.2d 348 (1988); *Hibbard*, 118 Wash.2d at 752, 826 P.2d 690. This is true in the toxic tort setting specifically. *Sahlie*, 99 Wash.2d at 554, 663 P.2d 473 (asbestos exposure); *White v. Johns-Manville Corp.*, 103 Wash.2d 344, 348, 693 P.2d 687, 49 A.L.R.4th 955 (1985); ****916** *Reichelt*, 107 Wash.2d at 772, 733 P.2d 530 ("A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations.").

FN3. We do not decide which statute is applicable to Kathleen Green's case.

[4] The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. "[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909). *Accord* *Enterprise Timber, Inc. v. Washington Title Ins. Co.*, 76 Wash.2d 479, 482, 457 P.2d 600 (1969); *American Sur. Co. of N.Y. v. Sundberg*, 58 Wash.2d 337, 344, 363 P.2d 99 (1961) ("notice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead."), *cert. denied*, 368 U.S. 989, 82 S.Ct. 598, 7 L.Ed.2d 526 (1962).

[5] The statute of limitations is not postponed by the fact that further, more serious harm may flow from the wrongful conduct. We said in *Lindquist v. Mullen*, 45 Wash.2d 675, 677, 277 P.2d 724 (1954) (quoting 34 AM. JUR. *Limitation of Actions* § 160), *overruled in part by* *Ruth v. Dight*, 75 Wash.2d 660, 453 P.2d 631 (1969) (establishing discovery rule):

Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

***97** The adoption of the discovery rule in *Ruth* modified this statement by declaring the statute of limitations does not attach at once, but only upon discovery of the harm. Nevertheless, the essence of the statement remains the same: the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur. *Reichelt*, 107 Wash.2d at 773, 733 P.2d 530. *See also* *Steele v. Organon, Inc.*, 43 Wash.App. 230, 716 P.2d 920 (1986); *Raymond v. Ingram*, 47 Wash.App. 781, 737 P.2d 314, *review denied*, 108 Wash.2d 1031 (1987); *Zaleck v. Everett Clinic*, 60 Wash.App. 107, 802 P.2d 826 (1991). *Cf.* *First Maryland Leasecorp v. Rothstein*, 72 Wash.App. 278, 864 P.2d 17 (1993).

To hold otherwise would run contrary to important policy considerations such as Washington's strong preference for avoiding the splitting of causes of action. *State v. Superior Court for Ferry County*, 145 Wash. 576, 579, 261 P. 110 (1927). In effect, a plaintiff would have a new action for damages for each new condition that became manifest. This could also lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct. We reject an approach leading to such a result.

The Greens and amicus Washington State Trial Lawyers Association (WSTLA) urge us to adopt what

they call the "two injury" rule [FN4] with respect to the discovery of harm. They argue the statute of limitations does not begin to run until a plaintiff discovers each "separate and distinct injury" flowing from the defendant's wrongful conduct. They argue Kathleen's T-shaped uterus was a separate and distinct injury caused by DES, and that she did not know about it until January 1992, when she heard the results of her HSG examination. While analogizing their situation to other latent injury cases like those arising from asbestos exposure, the Greens argue that because the T-shaped uterus is a separate and distinct injury, the statute of limitations ***98** did not begin to run until Kathleen discovered it. The record does not contradict her assertion she did not know about it until 1992, but begs the question of when, ****917** with the required exercise of "reasonable diligence," she *should* have known about it.

> FN4. The "two injury" rule is something of a misnomer. Under the theory advanced by the Greens and WSTLA, a separate statutory period applies to each separate and distinct injury regardless of the number.

Washington has not yet applied the "separate and distinct injuries" exception to the traditional rule regarding the harm element of the accrual of a cause of action. We decline to do so here in the absence of appropriate testimony that a T-shaped uterus and a cockscomb cervix are truly separate and distinct consequences of DES exposure. [FN5]

> FN5. The Greens submitted only one medical declaration, that of Dr. Hisham R. Tamimi, in support of their position in this case. While Dr. Tamimi is certainly a qualified expert, his declaration is entirely cursory on the key issue in this case. Dr. Tamimi testified:
>
> The cockscomb cervix and uterine malformation both represent the changes caused by DES exposure. Some exposed women exhibit both of these changes, others do not. Cervical and uterine changes are separate and distinct changes from exposure to DES. They do not always occur together.
>
> Clerk's Papers at 232. Dr. Tamimi's declaration gives us little help in deciding generally if the conditions associated with DES exposure are truly "separate and distinct" insofar as his declaration fails to point us toward epidemiological or clinical data on the relationship between DES exposure and associated consequences such as cancer, a T-shaped uterus, or a cockscomb cervix. Most pointedly, in Kathleen Green's case, we do not know if in 1986, when she was diagnosed with a cockscomb cervix due to DES exposure, whether a T-shaped uterus, to a reasonable medical probability, would have been revealed by an HSG, or even if such a procedure was routinely employed in 1986. *See* Guile v. Ballard Community Hosp., 70 Wash.App. 18, 851 P.2d 689 (expert affidavit which merely summarized plaintiff's postsurgical complications and concluded, without support, that
>
> defendant's "faulty technique" caused such complications did not defeat summary judgment motion), *review denied,* 122 Wash.2d 1010, 863 P.2d 72 (1993).

C. Summary Judgment in the Trial Court

[6] Turning to the specific facts in this case, because Eli Lilly does not claim Kathleen *actually* knew of her T-shaped uterus more than three years before she filed suit, the only question in this case is whether she *should* have known of its presence more than three years before ***99** the time she filed suit. [FN6] In order to sustain its burden as the moving party in the motion for summary judgment, Eli Lilly had to show there is no issue of material fact with regard to what Kathleen should

have known. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wash.2d 912, 915, 757 P.2d 507 (1988). Eli Lilly failed to carry its burden.

> FN6. The harm Kathleen Green sustained was the T-shaped uterus. The damages resulting from the harm consisted of her subsequent difficult pregnancy. Ms. Green's cause of action accrued when she first knew or should have known of her harm--the T-shaped uterus--not when she suffered resulting damages from that malformation. The Greens have conceded as much:
>
> Only on January 2, 1992, after undergoing the HSG, did Kathleen first kn [o]w or should have known of any potential damage to her reproductive organs, specifically her uterus. It is from this date, January 2, 1992, that the Court should begin the statute of limitations to run on the Greens' claims for injuries to Kathleen's reproductive organs and capabilities.
>
> Br. of Appellants at 20. This concession comports with the advice of their attorney, who declared: "I advised [the Greens] that date [the date of the HSG result] should be considered the date on which the statute of limitations began to run, even though there was not yet actual, provable reproductive disability." Clerk's Papers at 213. Thus, despite some inexact language suggesting the contrary, the Greens agree their cause of action arose no later than when she discovered her T-shaped uterus, not when Kathleen Green began having difficulties with her pregnancy.

Eli Lilly claims Ms. Green *could* have found out about her T-shaped uterus, and therefore *should* have found out about it, no later than 1986 (eight years before she initiated this action), when she had the abnormal pap smear and underwent the cryosurgery. Eli Lilly argues a "reasonable investigation would have revealed no later than 1986 ... all elements of a DES plaintiff's claim." Br. of Resp'ts at 20 (listing numerous publications on DES). [FN7]

> FN7. Eli Lilly also notes Green started law school in the summer of 1990, suggesting the knowledge he gained in his first year of law school about toxic torts may have animated the Greens to seek legal counsel, and gave him special knowledge regarding the discovery of claims.

[7] [8] In moving for summary judgment, Eli Lilly submitted no affidavits, declarations, or competent evidence of any kind to the trial court on the relationship of DES to T-shaped uterine problems or cervical malformations in DES daughters. ***100** It relied ****918** solely on its opening and reply briefs. [FN8] Missing from the record is a declaration from a health professional stating a T-shaped uterus is a well-known birth defect in DES daughters, and that medical knowledge would have allowed Kathleen to discover it in 1986. Eli Lilly says: "[Kathleen Green's T-shaped uterus] was detectable at any time in her life by means of a simple x-ray test." Supplemental Br. of Pet'r at 4. If this is true, it would surely have been an easy matter for Eli Lilly to have submitted the declaration of a qualified health professional saying as much. Absent such a declaration, Eli Lilly left the trial court in an evidentiary void. *See generally Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wash.2d 912, 757 P.2d 507 (1988). Eli Lilly offered only the argument of counsel. Argument of counsel does not constitute evidence. The Court of Appeals was correct in noting Eli Lilly "did not introduce any evidence that Ms. Green should have discovered that condition earlier." *Green*, 86 Wash.App. at 67, 935 P.2d 652.

> FN8. Eli Lilly belatedly contends in its response to the amicus brief of Schroeter Goldmark

& Bender that Ms. Green's T-shaped uterus could have been discovered "at any time" by the HSG procedure, citing a Minnesota federal district court case. *Narum v. Eli Lilly & Co.*, 914 F.Supp. 317 (D.Minn.1996). Even if correct, medical facts cited in a case report are not admissible evidence in a Washington court, nor is counsel competent to testify to medical facts or interpret the medical literature, to a reasonable medical probability, in Washington courts.

[9] [10] The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is ordinarily a question of fact. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 34-35, 864 P.2d 921 (1993); *Honcoop v. State*, 111 Wash.2d 182, 194, 759 P.2d 1188 (1988); *Ohler*, 92 Wash.2d at 510, 598 P.2d 1358. The defendants here bore the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). They did not carry their burden when they failed to produce evidence upon which the trial court could have properly relied in concluding Kathleen should have known about her T-shaped uterus more than three years before ***101** she filed suit. We therefore reverse the summary judgment, and remand the case for further proceedings.

D. Mr. Green's **Loss** of **Consortium** Claim

[11] [12] Washington recognizes **loss** of **consortium** as a separate, not derivative, claim. *Reichelt*, 107 Wash.2d at 776, 733 P.2d 530. Mr. Green's cause of action for **loss** of **consortium,** as a separate and independent claim, accrued when he first experienced injury due to **loss** of **consortium.** *Id.*

Joshua Green claims **loss** of **consortium** damages stemming from Kathleen's difficult pregnancy. The Court of Appeals correctly pointed out the rule in most jurisdictions: a **loss** of **consortium** claim does not lie when the injury to the spouse that caused the **loss** of **consortium** occurred prior to the marriage. *Green*, 86 Wash.App. at 68, 935 P.2d 652. *See* Charles Plovanich, Annotation, *Recovery for **Loss** of **Consortium** for Injury Occurring Prior to Marriage*, 5 A.L.R.4th 300 (1981 & 1997 Supp.). Because Kathleen Green's injury resulted from her mother's ingestion of DES while Kathleen was in utero, the injury was prior to her marriage to Joshua. Thus, Joshua arguably "married into" the injury, and ought not have a cause of action for loss of consortium.

One court listed three rationales for this rule: (1) a person should not be permitted to marry a cause of action; (2) one assumes with a spouse the risk of deprivation of consortium arising from any prior injury; (3) as a matter of policy, tort liability should be limited. *Stager v. Schneider*, 494 A.2d 1307, 1315 (D.C.App.1985). But the listed three rationales for the majority rule ignore the circumstance in which the injury to the affected spouse is latent and unknown. Joshua Green could not have married a lawsuit in 1988 if Kathleen herself did not know then she had a T-shaped uterus that would cause her to have difficult pregnancies. The "assumption of risk" rationale suffers from the same defect. One cannot assume a risk one does not and cannot know about. *Kirk v. Washington State University*, 109 Wash.2d 448, 454-55, 746 P.2d 285 (1987). The third ***919** rationale is also weak; it is surely foreseeable that ***102** a future spouse or close relative might suffer loss of consortium damages. The class of potential plaintiffs is therefore quite limited, confined to those who might some day be in consortium with an injured party. Thus, allowing such claims does not expose a tortfeasor to unbounded liability.

[13] The best argument for rejecting the majority rule, however, is its fundamental unfairness in the toxic exposure context: loss of consortium damages should be available for a premarital injury if the injured spouse either does not know or cannot know of the injury. Although still a distinct minority, several courts have recognized this principle in toxic torts cases. *Stager*, 494 A.2d 1307; *Kociemba v. G.D. Searle & Co.*, 683 F.Supp. 1577 (D.Minn.1988); *Aldredge v. Whitney*, 591 So.2d 1201 (La.App.1991); *Furby v. Raymark Indus., Inc.*, 154 Mich.App. 339, 397 N.W.2d 303 (1986). We now join those courts and hold that Joshua Green's claim for **loss** of **consortium** accrued when he knew or should have known the essential elements of his claim. [FN9] Because we decline to apply an

absolute bar to premarital injuries if the spouse seeking a **loss** of **consortium** claim could not know of the harm, we remand the case to the trial court where Mr. Green will have the burden of proving both when he first experienced the **loss** and what damages he suffered.

> FN9. The Court of Appeals held "a spouse's **loss** of **consortium** claim cannot accrue until the other spouse's claim, on which the **loss** of **consortium** depends, has also accrued." *Green,* 86 Wash.App. at 68, 935 P.2d 652. This is incorrect. The spouse's **loss** of **consortium** claim accrues when the spouse first suffers injury from **loss** of **consortium,** regardless of when the other spouse's injury claim accrues. *Reichelt,* 107 Wash.2d at 776, 733 P.2d 530.

CONCLUSION

As the moving party on summary judgment, Eli Lilly had the burden of showing there were no genuine issues of material fact necessitating a trial with respect to the time Kathleen Green should have known about her T-shaped uterus. Eli Lilly failed to carry its burden because it failed ***103** to produce competent evidence to show Kathleen Green should have known about her condition more than three years prior to the commencement of the current action.
With respect to Joshua Green's claim for loss of consortium, the rationale for the majority rule forbidding such claims for premarital injuries is fundamentally unfair in toxic exposure cases with latent injuries. We affirm the Court of Appeals, and remand the case to the trial court for further proceedings consistent with this opinion.

DURHAM, C.J., and DOLLIVER, SMITH, GUY, JOHNSON, MADSEN, ALEXANDER and SANDERS, JJ., concur.
Wash.,1998.
Green v. A.P.C. (Am. Pharmaceutical Co.)
136 Wash.2d 87, 960 P.2d 912, Prod.Liab.Rep. (CCH) P 15,320

Briefs and Other Related Documents (Back to top)

- 1998 WL 34360158 (Appellate Brief) Reply of Eli Lilly and Company, A Corporation to Amicus Briefs of Schroeter, Goldmark & Bender and Washington State Trial Lawyers Association (May. 11, 1998)
- 1998 WL 34360679 (Appellate Brief) Respondents Greens' Response to Brief of Amicus Curiae, Schroeter, Goldmark & Bender (May. 11, 1998)
- 1998 WL 34360157 (Appellate Brief) Brief of Amicus Curiae Schroeter, Goldmark & Bender (May. 06, 1998)
- 1998 WL 34361556 (Appellate Brief) Brief of Amicus Curiae Washington State Trial Lawyers Association (May. 01, 1998)
- 1997 WL 33824927 (Appellate Brief) Supplemental Brief of Petitioner Eli Lilly and Company, A Corporation (Dec. 05, 1997)
- 1997 WL 33824928 (Appellate Brief) Supplemental Brief of Respondents Green (Dec. 05, 1997)
- 1996 WL 33683533 (Appellate Brief) Appellants' Reply Brief (Aug. 15, 1996)
- 1996 WL 33683532 (Appellate Brief) Respondents' Answering Brief (Jun. 21, 1996)
- 1996 WL 33683531 (Appellate Brief) Appellants' Opening Brief (May. 22, 1996)

END OF DOCUMENT

Wallis v. Princess Cruises, Inc., 306 F.3d 827 (9th Cir. 09/24/2002)

[1] U.S. Court of Appeals, Ninth Circuit

[2] No. 01-56700

[3] 306 F.3d 827, 2002.C09.0000716 <http://www.versuslaw.com>, 2 Cal. Daily Op. Serv. 9829, 2002 Daily Journal D.A.R. 11,080

[4] September 24, 2002

[5] **BOBBIE JO WALLIS, IN HER INDIVIDUAL CAPACITY AS ADMINISTRATOR OF THE ESTATE AND PERSONAL REPRESENTATIVE OF JOEL ANDERSON WALLIS, DECEASED, FOR THE BENEFIT OF ERVIN B. WALLIS, HELEN WALLIS, JOEL SHANNON WALLIS, STACY TRENT WALLIS, JOLIE AMANDA WALLIS AND VALLIE JO WALLIS, PLAINTIFF-APPELLANT,**
v.
PRINCESS CRUISES, INC.; FAIRLANE SHIPPING INTERNATIONAL CORPORATION, LTD.; PRINCESS CRUISE LINES, LTD., DEFENDANTS-APPELLEES.

[6] Appeal from the United States District Court for the Central District of California William J. Rea, District Judge, Presiding D.C. No. CV-00-07239-WJR

[7] Counsel

[8] Franklin M. Tatum and Christiane E. Cargill, Wright Robinson Osthimer & Tatum, Los Angeles, California, for the plaintiff-appellant.

[9] Elsa M. Ward, Kaye, Rose & Partners, Los Angeles, California, for the defendants-appellees.

[10] Before: Ferdinand F. Fernandez, Kim McLane Wardlaw and William A. Fletcher, Circuit Judges.

[11] The opinion of the court was delivered by: W. Fletcher, Circuit Judge

[12] FOR PUBLICATION

[13] Argued and Submitted June 5, 2002--Pasadena, California

[14] OPINION

[15] Plaintiff Bobbie Jo Wallis brought an action against defendants Princess Cruises, Inc., and others for damages based on the death of her husband, who drowned off the coast of Greece after falling in an undetermined manner from defendants' cruise ship. The district court granted defendants' motions for summary judgment, with the exception of plaintiff's Death on the High Seas Act ("DOHSA") claim, and granted defendants' motion for partial summary judgment limiting their liability to approximately $60,000 in accordance with a clause printed in the back of the ticket contract. We reverse the grant of partial summary judgment limiting recoverable damages, and hold that a contract clause that merely refers to the " 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention')" does not reasonably communicate a liability limitation. We affirm the district court's order in all other respects.

[16] I. Background

[17] In the summer of 1999, Bobbie Jo Wallis and her husband, Joel Anderson Wallis, embarked on a Mediterranean cruise aboard the Grand Princess, a cruise ship owned by related companies Princess Cruises, Inc., Fairlane Shipping International Corporation Ltd., and Princess Cruise Lines, Ltd. ("Princess" or "defendants"). They were each given a ticket packet containing ticket coupons and a "Passage Contract." At the bottom of "Coupon 01" of the ticket packet was the warning headline "IMPORTANT NOTICE" in 1/8-inch type, followed by this statement in 1/16-inch type:

[18] THIS TICKET INCLUDES THE PASSAGE CONTRACT TERMS SET FORTH AT THE END OF THIS PACKET WHICH ARE BINDING ON YOU. PLEASE READ ALL SECTIONS CAREFULLY AS THEY AFFECT YOUR LEGAL RIGHTS, PARTICULARLY SECTION 14 GOVERNING THE PROVISION OF MEDICAL AND OTHER PERSONAL SERVICES AND SECTIONS 15 THROUGH 18 LIMITING THE CARRIER'S LIABILITY AND YOUR RIGHTS TO SUE.

[19] The warning headline and text was repeated four more times at the bottom of "Coupon 04," "Coupon 07," "Coupon 08," and "Coupon 09." Text of similar wording appeared across the top of the first page of the Passage Contract, located behind the ticket coupons. On pages six and seven of the Passage Contract was a paragraph entitled "16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION." The sixth and seventh sentences of the paragraph *fn1 read:

[20] Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention") which limits the Carrier's liability for death of or

personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property. If the Athens Convention or such exemptions are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply.

[21] The Passage Contract also required that all claims against Princess be litigated in a court located in the County of Los Angeles, California.

[22] Sometime in the early morning of July 10, 1999, Mr. Wallis disappeared from the Grand Princess. During this time, the ship was traveling towards Athens. No one saw Mr. Wallis fall overboard. By the time the Grand Princess docked in Athens, it was apparent that Mr. Wallis was missing from the ship. A certified statement from the Hellenic Coast Guard reports that a helicopter and multiple rescue boats were launched that day to search for Mr. Wallis. The distraught plaintiff initially remained on board, where she was given a sedative by the ship's physician and questioned by Greek police about her husband's disappearance. Plaintiff asserts that during this time, "Commodore Moulin [the ship's master] subjected [her] to remarks that her husband had fallen overboard; that he died in his fall from the ship; that his body would be sucked under the ship, chopped up by the propellers and probably would not be recovered." Later that afternoon, Commodore Moulin informed plaintiff that the Grand Princess was set to leave port at 5:30 p.m., and that she had a choice of disembarking or continuing with the cruise. Plaintiff chose to disembark and stay in Athens.

[23] On July 16, 1999, Mr. Wallis' body washed ashore near Lavrio, Greece. The body was severely decomposed, but nothing in the record indicates that the body had been cut by propellers. Since Mr. Wallis' death, plaintiff has been diagnosed with depression and post-traumatic stress disorder. Plaintiff claims that she has recurring images of her husband being pulled under the ship and into its propellers.

[24] Plaintiff filed this action against Princess in federal district court, alleging seven causes of action against Princess, including wrongful death under DOHSA, 46 U.S.C. §§ 761-767; intentional infliction of emotional distress; breach of contract; and fraud in various marketing materials. Princess moved for summary judgment striking all claims or, alternatively, for partial summary judgment limiting Princess' liability to the amount (approximately $60,000) prescribed by the Convention Relating to the Carriage of Passengers and Their Luggage by Sea ("Athens Convention"), incorporated by reference in paragraph 16 of the Passage Contract. On August 14, 2001, the district court granted Princess' motions for summary judgment on all claims except for the DOHSA claim, and granted the motion for partial summary judgment limiting Princess' liability. Plaintiff timely appealed the district court's grant of partial summary judgment on the amount of recoverable damages, and its grant of summary judgment on the claim for intentional infliction of emotional distress.

[25] II. Discussion

[26] A grant of summary judgment is reviewed de novo. Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1257 (9th Cir. 2001). We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id.

[27] A. Jurisdiction

[28] Under 28 U.S.C. § 1292(a)(3), a court of appeal has jurisdiction over "[i]nterlocutory decrees of . . . district courts . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." Princess contends that because the district court left for trial the issue of whether Princess was liable for a negligent search under DOHSA, the district court's decision below did not "determin[e] the rights and liabilities of the parties" within the meaning of § 1292(a)(3). Therefore, according to Princess, the district court's decision is not subject to interlocutory review under § 1292(a)(3). We have jurisdiction to determine our scope of jurisdiction. See Breed v. Hughes Aircraft Co., 253 F.3d 1173, 1177 (9th Cir. 2001).

[29] We have previously stated that "§ 1292(a)(3) is an exception to the final judgment rule and, therefore, is construed narrowly. It permits appeals only when the order appealed from determines the rights and liabilities of the parties." Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1136 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001). At the same time, we have twice exercised jurisdiction to hear interlocutory appeals under this section when the district court has upheld the validity of a clause limiting the amount of liability but has not reached the question of whether the defendant was actually liable. See Carman Tool & Abrasives, Inc. v. Evergreen Lines, 871 F.2d 897 (9th Cir. 1989); Vision Air Flight Service, Inc. v. M/V National Pride, 155 F.3d 1165 (9th Cir. 1998).

[30] In Carman Tool, defendants were sued for negligent handling of cargo. We wrote:

[31] As an affirmative defense, [defendants] asserted that their liability, if any, is limited to $500 per package, pursuant to section 4(5) of COGSA [Carriage of Goods at Sea Act], 46 U.S.C.App. § 1304(5) (1982 & Supp. III 1985), the terms of the contract of carriage as contained in the bill of lading . . . .

[32] All parties moved for partial summary judgment as to whether defendants' liability is limited to $500 per package. The district court granted partial summary judgment in favor of defendants, and plaintiffs took an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3) (1982). 871 F.2d at 899 (footnote omitted) (emphasis added).

[33] Although the district court in Carman Tool had made no determination as to whether the defendants were actually liable, we nonetheless exercised jurisdiction under § 1292(a)(3) to determine whether the defendants' potential liability was properly limited to $500 per package pursuant to COGSA.

[34] Our case is procedurally and jurisdictionally identical to Carman Tool. As an affirmative defense, Princess asserted that its liability, if any, for the death of Mr. Wallis is limited to roughly $60,000 pursuant to its Passage Contract. Princess moved for partial summary judgment as to whether its liability is so limited, and the district court granted the motion. As in Carman Tool, the district court in our case has not decided whether Princess is actually liable for plaintiff's wrongful death claim. It has only decided that, if Princess were liable, its liability would be limited pursuant to the contract.

[35] Similarly, in Vision Air, plaintiff sued the defendant carrier for having destroyed two trucks while unloading them from its ship. The defendant moved for partial summary judgment to cap its liability at $500 per truck pursuant to COGSA. The district court granted the defendant's motion, and the plaintiff appealed under § 1292(a)(3). We held that we had "jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3), and review a partial grant of summary judgment de novo." 155 F.3d at 1168. We then vacated the district court's grant of partial summary judgment because the record contained evidence that could permit the conclusion that one of the two trucks had been destroyed intentionally. Intentional destruction would have constituted a "deviation" under maritime law and would have made COGSA's limitation of liability unavailable to the carrier. Id. at 1170-75.

[36] It is reasonably clear from our opinion in Vision Air that the district court had not determined actual liability when we exercised jurisdiction over the interlocutory appeal. First, the district court had granted "partial" summary judgment in a case in which the only question was the liability of the defendant for the destruction of the trucks. If the district court had determined actual liability, as well as limitation of liability, summary judgment would not have been merely partial. Second, there is no indication anywhere in our opinion that the district court had decided anything other than the limitation of liability question; nor did we ourselves decide anything other than that question.

[37] Princess cites several out-of-circuit cases holding that § 1292(a)(3) requires a determination of actual liability by the district court. See Evergreen Int'l (USA) Corp. v. Standard Warehouse, 33 F.3d 420, 424 (4th Cir. 1994) (holding that § 1292(a)(3) should be construed narrowly to limit appeals to those cases where liability has been determined); BucherGuyer AG v. M/V Incotrans Spirit, 868 F.2d 734, 735 (5th Cir. 1989) (holding that the "decision whether the $500 COGSA limitation on damages applies in this case is not a decision determining the rights and liabilities of the parties" because even "if we were to hold that the $500 limit applies, we would still have to remand this case for a decision on whether the defendants were liable"); Burgbacher v. Univ. of Pittsburgh, 860 F.2d 87, 88 (3d Cir. 1988) (dismissing appeal under § 1292(a)(3) because "a liability determination has not been made").

[38] We think that these other circuits have read § 1292(a)(3) too narrowly. We believe that we properly exercised jurisdiction in Carman Tool and Vision Air, and that we have jurisdiction over an interlocutory appeal under § 1292(a)(3) where, as here, only the validity and applicability of a provision limiting liability has been determined. If a district court

holds that a limitation of liability clause is valid and applicable, that determination will, as a practical matter, usually end the case. For example, in a COGSA case, if the district court has held that a plaintiff can recover no more than $500 if actual liability is established, an economically rational plaintiff will not ordinarily pursue the case to judgment, and the correctness of the district court's determination of applicability of the liability limitation will never be reviewed.

[39] Limitation of liability provisions are common in maritime cases, not limited to cases brought under COGSA. As we read § 1292(a)(3), it takes into account the practical problem posed by limitations of liability. Its explicit text of § 1292(a)(3) authorizes "interlocutory decrees." If the phrase "determination of the . . . liabilities," which occurs later in the same text, were construed to exclude a determination of limitations of liability from "interlocutory decrees," such a construction would make interlocutory appeals impossible in many admiralty cases, and would do so in precisely those cases where such appeals are most needed. We therefore hold that we have jurisdiction to decide this interlocutory appeal.

[40] B. Enforceability of Liability Limitation

[41] [1] A cruise line passage contract is a maritime contract governed by general federal maritime law. See Milanovich v. Costa Crociere, S.p.A., 954 F.2d 763, 766 (D.C. Cir. 1992). The district court granted Princess' motion for partial summary judgment after concluding that the Passage Contract contractually limited Princess' liability to the amount prescribed by the Athens Convention through the following statement in paragraph 16: "Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention') which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property." Plaintiff argues that the Passage Contract's incorporation of the Athens Convention limitation is unenforceable because: 1) it is contrary to the public policy of the United States; and 2) it does not reasonably communicate the limitation of liability. We address plaintiff's arguments in turn.

[42] Plaintiff first contends that 46 U.S.C. app. § 183c(a) prohibits Princess from enforcing passage contract provisions purporting to limit liability. *fn2 The statute reads, in relevant part:

[43] It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation . . . purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury . . . . All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby

declared to be against public policy and shall be null and void and of no effect. 46 U.S.C. app. § 183c(a) (emphasis added).

[44] The parties do not dispute that the Grand Princess voyage upon which plaintiff and her husband sailed did not touch a United States port.

[45] Thus, the terms of § 183c(a) plainly do not apply to the Passage Contract of plaintiff's cruise. Further, the legislative history cited by plaintiff suggests a congressional intent, consistent with the text, to regulate all foreign carriers within the waters of the United States, but not to regulate foreign vessels in foreign waters. See Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 915 (3d Cir. 1988) ("Congress, in Sections 183b and 183c, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment."), overruled on other grounds by Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989); Mills v. Renaissance Cruises, Inc., 1992 WL 471301 (N.D. Cal. Aug. 17, 1992) (same).

[46] [2] Plaintiff next argues that the Passage Contract does not reasonably communicate the limitation so that a passenger can become meaningfully informed of its terms. In this circuit, we employ a two-pronged "reasonable communicativeness" test, adopted from Shankles v. Costa Armatori, S.P.A., 722 F.2d 861 (1st Cir. 1983), to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. See Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1363 (9th Cir. 1987) (applying First Circuit test for maritime cases to case involving air carrier); see also Dempsey v. Norwegian Cruise Line, 972 F.2d 998, 999 (9th Cir. 1992) (bringing Deiro analysis back to maritime cases). "[T]he 'proper test of reasonable notice is an analysis of the overall circumstances on a caseby-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake.' " Deiro, 816 F.2d at 1364 (quoting Shankles, 722 F.2d at 866). Whether the ticket provides reasonable notice is a question of law, which we review de novo. See Dempsey, 972 F.2d at 999.

[47] [3] The first prong of the reasonable communicativeness test focuses on the physical characteristics of the ticket. Here we assess " '[f]eatures such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.' " Deiro, 816 F.2d at 1364 (quoting Shankles, 722 F.2d at 864). We believe the physical characteristics of the ticket in this case are such that the terms and conditions are sufficiently conspicuous to the passenger. The reference to the Athens Convention liability limitation is buried six sentences into paragraph 16 in extremely small (1/16 inch) type. However, paragraph 16 is legible, and it carries the heading: "16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION." The "IMPORTANT NOTICE" warning headline reminds the passenger at least five times to read "SECTIONS 15 THROUGH 18." The pages upon which paragraph 16 is printed are marked with the words, "PASSAGE CONTRACT," in the upper right hand corner. Other courts have consistently found tickets with similar physical features to have provided

reasonable notice that contractual terms are contained therein. See, e.g., Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir. 1995); Spataro v. Kloster Cruise, Ltd., 894 F.2d 44 (2d Cir. 1990); Hodes, 858 F.2d 905; McQuillan v. "Italia" Societa Per Azione Di Navigazione, 386 F. Supp. 462 (S.D.N.Y. 1974).

[48] [4] The second prong of the reasonable communicativeness test requires us to evaluate " 'the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract.' " Deiro, 816 F.2d at 1364 (quoting Shankles, 722 F.2d at 865). "The surrounding circumstances to be considered include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket." Id. (emphasis added). This prong allows us to examine more subjective, " 'extrinsic factors indicating the passenger's ability to become meaningfully informed.' " Id. (quoting Shankles, 722 F.2d at 866) (emphasis added).

[49] [5] We believe the liability limitation at issue fails this second prong. It is undisputed that paragraph 16 itself does not specify a limitation to Princess' liability; the paragraph only references the "liability limitations . . . applicable to [Princess] under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1976.' " It is also unclear from paragraph 16 whether the liability limitations applicable under the Athens Convention would necessarily apply, as the above incorporation is followed by the language, "If the Athens Convention or such exemptions are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply." (Emphasis added.)

[50] [6] A passenger wishing to inform herself of the nature of the possible liability limitation in paragraph 16 is likely to look up the "Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea," which was signed in 1974. The passenger would have to understand that paragraph 16, which specifies the date 1976 rather than 1974, refers to the Athens Convention as amended in 1976, requiring her to look up the 1976 "Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea." Upon finding the 1976 Protocol, the passenger would discover that Article 7, paragraph 1, of the Athens Convention, as amended by the 1976 Protocol, states in pertinent part: "The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 46,666 units of account per carriage." Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Nov. 19, 1976. The passenger would then have to look at Article 9 of the Athens Convention, as amended by the 1976 Protocol, to learn that a "Unit of Account" is the same as a "Special Drawing Right as defined by the International Monetary Fund" and that "[t]he amount[ ] mentioned in Article[ ] 7 . . . shall be converted into the national currency of the State of the Court seized of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the Parties." Id. The passenger presumably would have no way of predicting when a potential "date of . . . judgment" would be, but if the passenger wished to calculate a value for 46,666 Special Drawing Rights ("SDR"s), she would have to learn the meaning of the term, and would then have to check a financial source tracking the daily conversion rate for an SDR. *fn3 Only after such research would the passenger have any

sense of the estimated limitation on Princess' liability in the event of personal injury or death--assuming, that is, that the Athens Convention even applied. The United States is not a signatory to the 1974 Convention or the 1976 Protocol. We think it is unrealistic to assume the average passenger with no legal background would even attempt to analyze the conditions under which the Athens Convention would or would not apply. *fn4

[51] [7] We are persuaded that the average passenger has little incentive to invest sufficient effort to approximate the value of what she would be led to regard (by the language of paragraph 16 itself) as only a potentially binding term of the Passage Contract. Under the reasonable communicativeness test, a disincentive "to study the provisions of the ticket" is considered an extrinsic factor impeding "the passenger's ability to become meaningfully informed." Moreover, even if a passenger were motivated to undertake such effort, it would require some legal and financial sophistication, which are additional extrinsic factors, to research the liability limitation reference in paragraph 16. For this reason, we hold that Princess' incorporation of the Athens Convention liability limitation does not satisfy the second prong of the reasonable communicativeness test.

[52] Our holding is consistent with our previous decisions in Komatsu, Ltd. v. States Steamship Co., 674 F.2d 806 (9th Cir. 1982), and Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287 (9th Cir. 1997). In Komatsu, a district court found an ocean carrier liable for damage to the plaintiffs' cargo. One of the issues raised on appeal was "whether an ocean carrier is entitled to the damage limitation in COGSA § 4(5) if it incorporates by reference COGSA into its bill of lading." Komatsu, 674 F.3d at 808. We held that the defendant was not entitled to the liability limitation as a matter of law, and rejected the defendant's argument that:

[53] "an experienced shipper should be deemed to have knowledge of an opportunity to secure an alternative freight rate, and higher carrier liability by reason of his knowledge of COGSA, 46 U.S.C. § 1304(5), made applicable by a 'Paramount Clause' in the bill of lading, where such opportunity does not present itself on the face of the bill of lading. The bill of lading is usually a boilerplate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively low-level shipping employee. We feel that imputing such knowledge of COGSA applicability and provisions to such an employee is an assumption that may go beyond the bounds of commercial realism." Id. at 809-10 (emphasis added) (quoting Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co., 559 F.2d 1173, 1177 (9th Cir. 1977)).

[54] It would make little sense to hold that a reference to a federal shipping statute provides insufficient notice to an employee of an experienced shipper, but that a reference to a foreign treaty provides sufficient notice to a non-commercial passenger who may take a cruise only once or twice in her lifetime.

[55] In Chan, we held that "[c]ruise passenger tickets are contracts of adhesion, and as such, ambiguities in them must be construed against the carrier." Chan, 123 F.3d at 1292. We refused to enforce a clause absolving a carrier's responsibility for personal injuries because of ambiguous language in the purported disclaimer. The problem with the contract terms in

the Passage Contract in this case may be that they are opaque rather than ambiguous. But opaqueness, like ambiguity, obscures the meaning of an instrument that "in case of doubt . . . is to be taken against the party that drew it." Rams v. Royal Caribbean Cruise Lines, Inc., 17 F.3d 11, 12 (1st Cir. 1994) (internal quotation omitted), cited in Chan, 123 F.3d at 1292).

[56] Princess asserts in its brief that in Chan v. Korean Air Lines, 490 U.S. 122 (1989), the Supreme Court held that "a limitation amount need not be stated in the airline ticket at all; only a statement the transportation was subject to the [Warsaw] Convention was needed." We believe this assertion misrepresents the holding of the case. In Korean Air Lines, plaintiffs brought wrongful death actions against Korean Airlines ("KAL"). All parties agreed that their rights were governed by the multilateral treaty known as the Warsaw Convention. A private accord among airlines, known as the Montreal Agreement, required carriers to give notice of the Warsaw Convention's damages limitation for personal injury or death in print size no smaller than 10-point type. The issue in Korean Air Lines was whether the treaty imposed a sanction eliminating the damages limitation when the requirement of the Montreal Agreement was not met. (The Warsaw Convention's liability rules were printed on KAL's passenger tickets in 8-point type instead of 10-point type.) The Court held that nothing in the plain language of the Montreal Agreement or the Warsaw Convention provided elimination of the damages limitation as the sanction for defective notice.

[57] The Court based its conclusion on its interpretation of a treaty's text, not on reasonable notice principles applicable to maritime contracts. The Court did not hold that a passage contract need not provide notice of liability limitations.

[58] Furthermore, unlike the Warsaw Convention, the Athens Convention has never been ratified by the United States. Therefore, unlike the Warsaw Convention, the Athens Convention carries no force of law on its own. See Chan v. Soc'y Expeditions, 123 F.3d at 1296. The limitation of liability provision of the Athens Convention is legally enforceable only as a term of a legitimate contract. As such, an Athens Convention limitation must be reasonably communicated before it can bind a passenger under federal maritime law.

[59] Almost all of the remaining cases Princess cites in support of its claims that "the terms and conditions of Princess' ticket contract have repeatedly been found 'reasonably communicative' " and that "[o]ther cruise line ticket contracts which are substantially similar or identical to Princess' have also routinely met the 'reasonable communicative' test as a matter of law," the nature and/or amount of the limitation in question was explicitly stated in the contract. See Effron, 67 F.3d 7 (express forum selection clause); Dempsey, 972 F.2d 998 (express time limitation clause); Spataro, 894 F.2d 44 (express time limitation clause); Sharpe v. W. Indian Co., Ltd., 118 F. Supp. 2d 646 (D.V.I. 2000) (enforcing express time limitation clause but construing ambiguities in another clause against drafter); Walker v. Carnival Cruise Lines, 63 F. Supp. 2d 1083 (N.D. Cal. 1999) (express forum selection clause), modified on other grounds, 107 F. Supp. 2d 1135 (N.D. Cal. 2000); Bounds v. Sun Line Cruises, Inc., 1997 A.M.C. 25 (C.D. Cal. 1996) (express forum selection clause); Osborn v. Princess Tours, Inc., 1996 A.M.C. 1481 (C.D. Cal. 1996) (express time limitation clause); Osborn v. Princess Tours, Inc., 1995 A.M.C. 2119 (S.D.

Tex. 1995) (express forum selection clause); Roberson v. Norwegian Cruise Line, 897 F. Supp. 1285 (C.D. Cal. 1995) (express forum selection clause); Melnik v. Cunard Line Ltd., 875 F. Supp. 103 (N.D.N.Y. 1994) (express forum selection clause); Berg v. Royal Caribbean Cruise Ltd., 1992 WL 609803 (D.N.J. Feb, 20, 1992) (express time limitation clause); Miller v. Regency Maritime Corp., 824 F. Supp. 200 (N.D. Fla. 1992) (express forum selection clause); Mills, 1992 WL 471301 (provision explicitly limiting liability for personal injury or death to "S.D.R. 46,666"); Becantinos v. Cunard Line Ltd., 1991 WL 64187 (S.D.N.Y.) (passage contract appears to have explicitly limited recovery value to 530 British pounds); and McQuillan, 386 F. Supp. 462 (express time limitation clause).

[60] [8] Finally, we note that our holding is not precluded by the Court's decision in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). In Shute, the Court held that a forum selection clause in a cruise line's passage contract was reasonable and enforceable despite the facts that the clause was not the product of negotiation, and that respondents were physically and financially incapable of litigating in the selected forum. The Court expressly stated in Shute that:

[61] [W]e do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. Brief for Respondents 26 ("The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated"). Shute, 499 U.S. at 590 (emphasis added).

[62] As the opinion makes clear, the Court in Shute evaluated the enforceability of the forum selection clause under the assumption that it was reasonably communicated to the plaintiffs. We have been asked to decide an antecedent issue: whether the contract term in question was reasonably communicated in the first place.

[63] We now decide that issue, and hold that a passage contract clause that merely references the " 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention')" without providing an approximate monetary limitation does not meaningfully inform a passenger of a liability limitation, and is therefore unenforceable.

[64] C. Intentional Infliction of Emotional Distress

[65] 1. Choice of Law

[66] In granting summary judgment to defendants on plaintiffs' claim for intentional infliction of emotional distress, the district court assumed without discussion that the claim is governed by general maritime law. Plaintiff argues on appeal that the district court should have applied California law instead because her claim, based on "the outrageous verbal conduct of Defendants and their failure to provide promised legal counsel or psychological

assistance," "does not implicate the traditional areas of the admiralty bar's expertise nor does it threaten to effect [sic] maritime commerce."

[67] The Supreme Court held in Sisson v. Ruby, 497 U.S. 358 (1990), that general maritime law governs a tort claim when conditions of location and connection to maritime activity are satisfied. "A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995). The connection test requires the court to analyze two issues: 1) "whether the incident has 'a potentially disruptive impact on maritime commerce' "; and 2) "whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " Id. (internal citations omitted).

[68] Plaintiff does not dispute that the facts underlying her claim satisfy the location test. Plaintiff argues, however, that because her claim is based primarily on the verbal conduct of crewmembers and not on any acts or omissions related to the search and rescue for Mr. Wallis, the "incident" underlying her claim is not substantially related to traditional maritime activity. We believe that plaintiff focuses too narrowly on the particular causes of the alleged harm, and hold that the general "activity giving rise to the incident" satisfies the connection test. Sisson, 497 U.S. at 364. The Court emphasized in Sisson that:

[69] [o]ur cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." In Executive Jet [Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972)], for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally. Id. (emphasis added).

[70] Similarly, the relevant activity in this case is not simply the crewmembers' verbal conduct or the omitted legal and psychological assistance, but a cruise ship's treatment of passengers generally. A cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity. Hence, the district court did not err in applying general maritime law to plaintiff's claim for intentional infliction of emotional distress.

[71] 2. Merits

[72] Noting that there is no maritime law concerning a claim for intentional infliction of emotional distress, the district court measured the sufficiency of Plaintiff's claim under the Restatement (Second) of Torts § 46. Although we have held that claims for emotional distress are cognizable under admiralty law, see Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1409 (9th Cir. 1994), there appears to be no established maritime standard for evaluating such claims. See Muratore v. M/ S Scotia Prince, 845 F.2d 347, 353 n.3 (1st Cir. 1988) ("[T]he district court applied Maine law because there is no rule of law in maritime law on infliction of emotional distress."); York v. Commodore Cruise Line, Ltd., 863 F.

Supp. 159, 164 (S.D.N.Y. 1994) ("There is no maritime law concerning plaintiffs' claim that defendants' conduct surrounding the subsequent investigation constituted the intentional infliction of emotional distress."). We have the authority to develop general maritime law regarding claims not directly governed by congressional legislation or admiralty precedent. Chan, 39 F.3d at 1409; see also Thomas J. Schoenbaum, Admiralty and Maritime Law, § 4-1, at 146 (3d ed. 2001) ("When new situations arise that are not directly governed by legislation or admiralty precedent, federal courts may fashion a rule for decision by a variety of methods. Federal courts may, and often do, look to state statutory law and to precepts of the common law which they 'borrow' and apply as the federal admiralty rule." (footnote omitted)). While we do not regard the Restatement (Second) of Torts as the only source of maritime law governing claims for intentional infliction of emotional distress, we recognize that it has been regularly employed by other courts to evaluate intentional infliction of emotion distress claims in federal maritime cases. See, e.g., Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1283 n.23 (1st Cir. 1993); York, 863 F. Supp. at 164; Nelsen v. Research Corp. of Univ. of Haw., 805 F. Supp. 837, 851-52 (D. Haw. 1992). We will do the same.

[73] Section 46 of the Restatement states in pertinent part: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Comment d elaborates:

[74] The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Restatement (Second) of Torts § 46 cmt. d (1965) (emphasis added).

[75] The facts surrounding plaintiff's claim for intentional infliction of emotional distress are disputed, but if viewed in the light most favorable to plaintiffs (the nonmoving party), the evidence would show that during the morning of Mr. Wallis' disappearance, Commodore Moulin stated to someone else, but in plaintiff's hearing, that Mr. Wallis was probably dead and that his body would be sucked under the ship, chopped up by the propellers, and probably not be recovered. The evidence would also show that Princess neglected to provide legal assistance when plaintiff was questioned by Greek authorities or to provide emotional counseling when she became hysterical.

[76] We believe the district court was correct when it found that the above conduct was not "extreme and outrageous." As the district court noted, while the statements and other behavior of Commodore Moulin and the crewmembers were unsympathetic, "there is

nothing in the record to support a finding that anybody from Princess went out of their way to torment or mistreat the Plaintiff in a manner that our society could view as utterly deplorable." Indeed, there is no evidence that Commodore Moulin directed his statement to plaintiff or even purposely made it within her hearing. As the district court explained, "officials are often forced with the unenviable task of asking difficult questions at sensitive times or explaining gruesome contingencies."

[77] The standard for intentional infliction of emotional distress under § 46 of the Restatement is extremely difficult to meet and has not been met here. See, e.g., York, 863 F. Supp. 159 (ship's failure to notify authorities of cruise passenger's rape claim, ship's misrepresentation of examining doctor, and ship's misrepresentation of applicable law not found to be outrageous); Visconti v. Consol. Rail Corp., 801 F. Supp. 1200 (S.D.N.Y. 1992) (plaintiff's allegations of 54 separate incidents of harassment and abuse--including harassment and belligerence by her managers; fabrications of work rule violations and insubordination; false charges of reproduction and removal of confidential documents; laughter and humiliation in front of co-workers; and obscene language and phone calls --failed to constitute "outrageous behavior"). We therefore hold that the district court properly granted Princess' motion for summary judgment on this claim. *fn5

[78] Conclusion

[79] [9] For the foregoing reasons, we REVERSE the district court's grant of partial summary judgment limiting Princess' liability, AFFIRM the district court's grant of summary judgment on the claim for intentional infliction of emotional distress, and REMAND for further proceedings consistent with this opinion.

[80] Each side will bear its own costs.

Opinion Footnotes

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[81] *fn1 Paragraph 16 of the Passage Contract stated in full: 16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION. Carrier is not liable for death, injury, illness, damage, delay or other loss to person or property of any kind caused by an Act of God, war, civil commotions, labor trouble, governmental interference, perils of the sea, fire, thefts, or any other cause beyond Carrier's reasonable control, or any other act not shown to be caused by Carrier's negligence. Carrier hereby disclaims all liability to the passenger for damages for emotional distress, mental anguish of psychological injury of any kind under any circumstances, when such damages were neither the result of a physical injury to the Passenger, nor the result of that Passenger having been at actual risk of physical injury, nor intentionally inflicted by Carrier. Pre and post cruise tours, shore excursions and any/all connecting ground, vessel or air transportation and other tours may be owned and/or

operated by independent contractors and Carrier makes no representations and assumes no responsibility therefore. If You use the ship's athletic or recreational equipment or take part in organized activities, whether on the ship or as part of a shore excursion, You assume the risk of injury, death, illness or other loss and Carrier is not liable or responsible for it. Carrier in no event is liable to You in respect of any occurrence taking place other than on the ship or launches owned or operated by Carrier. Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention") which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property. If the Athens Convention or such exemptions and limitations are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply. Each Passenger agrees to indemnify Carrier for any damages, liabilities, losses, penalties, fines, charges or expenses incurred or imposed upon Carrier as a result of any act, omission or violated of law by the Passenger or any minor Passenger for whom the Passenger is responsible.

[82] *fn2 Princess argues that plaintiff may not raise this issue on this appeal because it was first raised in oral argument in district court. Not only does the case cited by Princess, Moreno Roofing Co. v. Nagle, 99 F.3d 340 (9th Cir. 1996), fail to support its contention that this court cannot consider an issue raised orally before the district court, but, as plaintiff also notes, this court has the power to consider arguments for the first time on appeal when "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1141 (9th Cir. 2001) (internal quotation marks omitted).

[83] *fn3 The conversion rate on September 16, 2002: was 1 SDR = 1.31288 U.S. Dollars. See http://www.imf.org. This accords with the parties' estimated value of $60,000 for 46,666 SDRs.

[84] *fn4 According to Article 2 of the Athens Convention: 1. This Convention shall apply to any international carriage if: (a) the ship is flying the flag of or is registered in a State Party to this Convention, or (b) the contract of carriage has been made in a State Party to this Convention, or (c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention. 2. Notwithstanding paragraph 1 of this Article, this Convention shall not apply when the carriage is subject, under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea. Athens Convention Relating to the Carriage of Passengers and Their Carriage by Sea, Dec. 13, 1974. Article 22 provides that any party may declare in writing that it will not give any effect to the Athens Convention when the passenger and the carrier are subjects or nationals of that party. Id.

[85] *fn5 Because we agree that the district court properly granted Princess' motion for summary judgment on the intentional infliction of emotional distress claim, we do not need to reach

Princess' alternative argument that the claim is preempted by DOHSA.

20020924

BOBBIE JO WALLIS, in her individual capacity as Administrator of the Estate and Personal Representative of Joel Anderson Wallis, Deceased, for the benefit of Ervin B. Wallis, Helen Wallis, Joel Shannon Wallis, Stacy Trent Wallis, Jolie Amanda Wallis and Vallie Jo Wallis, Plaintiff-Appellant, v. PRINCESS CRUISES, INC.; FAIRLANE SHIPPING INTERNATIONAL CORPORATION, LTD.; PRINCESS CRUISE LINES, LTD., Defendants-Appellees.

No. 01-56700

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

306 F.3d 827; 2002 U.S. App. LEXIS 20097; 2002 AMC 2270; 2002 Cal. Daily Op. Service 9829; 2002 Daily Journal DAR 11080

June 5, 2002, Argued and Submitted, Pasadena, California
September 24, 2002, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-07239-WJR. William J. Rea, District Judge, Presiding.

DISPOSITION: Reversed in part, affirmed in part and remanded for further proceedings.

COUNSEL: Franklin M. Tatum and Christiane E. Cargill, Wright Robinson Osthimer & Tatum, Los Angeles, California, for the plaintiff-appellant.

Elsa M. Ward, Kaye, Rose & Partners, Los Angeles, California, for the defendants-appellees.

JUDGES: Before: Ferdinand F. Fernandez, Kim McLane Wardlaw and William A. Fletcher, Circuit Judges. Opinion by Judge William A. Fletcher.

OPINIONBY: William A. Fletcher

OPINION: [*830]

W. FLETCHER, Circuit Judge:

Plaintiff Bobbie Jo Wallis brought an action against defendants Princess Cruises, Inc., and others for damages based on the death of her husband, who drowned off the coast of Greece after falling in an undetermined manner from defendants' cruise ship. The district court granted defendants' motions for summary judgment, with the exception of plaintiff's Death on the High Seas Act ("DOHSA") claim, and granted defendants' motion for partial summary judgment limiting their liability to approximately $ 60,000 in accordance with a clause printed in the back of the ticket contract. We reverse the grant of partial summary [**2] judgment limiting recoverable damages, and hold that a contract clause that merely refers to the "'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention')" does not reasonably communicate a liability limitation. We affirm the district court's order in all other respects.

I. Background

In the summer of 1999, Bobbie Jo Wallis and her husband, Joel Anderson Wallis, embarked on a Mediterranean cruise aboard the Grand Princess, a cruise ship owned by related companies Princess Cruises, Inc., Fairlane Shipping International Corporation Ltd., and Princess Cruise Lines, Ltd. ("Princess" or "defendants"). They were each given a ticket packet containing ticket coupons and a "Passage Contract." At the bottom of "Coupon

01" of the ticket packet was the warning headline "IMPORTANT NOTICE" in 1/8-inch type, followed by this statement in 1/16-inch type:
THIS TICKET INCLUDES THE PASSAGE CONTRACT TERMS SET FORTH AT THE END OF THIS PACKET WHICH ARE BINDING ON YOU. PLEASE READ ALL SECTIONS CAREFULLY AS THEY AFFECT YOUR LEGAL RIGHTS, PARTICULARLY SECTION 14 GOVERNING THE PROVISION OF MEDICAL AND OTHER PERSONAL SERVICES AND SECTIONS 15 THROUGH [**3] 18 LIMITING THE CARRIER'S LIABILITY AND YOUR RIGHTS TO SUE.

The warning headline and text was repeated four more times at the bottom of "Coupon 04," "Coupon 07," "Coupon 08," and "Coupon 09." Text of similar wording appeared across the top of the first page of the Passage Contract, located behind the ticket coupons. On pages six and seven of the Passage Contract was a paragraph entitled "16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION." The sixth and seventh sentences of the paragraph n1 read:

[*831] Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention") which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property. If the Athens Convention or such exemptions are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) [**4] will apply.

The Passage Contract also required that all claims against Princess be litigated in a court located in the County of Los Angeles, California.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Paragraph 16 of the Passage Contract stated in full:
16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION.

Carrier is not liable for death, injury, illness, damage, delay or other loss to person or property of any kind caused by an Act of God, war, civil commotions, labor trouble, governmental interference, perils of the sea, fire, thefts, or any other cause beyond Carrier's reasonable control, or any other act not shown to be caused by Carrier's negligence. Carrier hereby disclaims all liability to the passenger for damages for emotional distress, mental anguish of psychological injury of any kind under any circumstances, when such damages were neither the result of a physical injury to the Passenger, nor the result of that Passenger having been at actual risk of physical injury, nor intentionally inflicted by Carrier. Pre and post cruise tours, shore excursions and any/all connecting ground, vessel or air transportation and other tours may be owned and/or operated by independent contractors and Carrier makes no representations and assumes no responsibility therefore. If You use the ship's athletic or recreational equipment or take part in organized activities, whether on the ship or as part of a shore excursion, You assume the risk of injury, death, illness or other loss and Carrier is not liable or responsible for it. Carrier in no event is liable to You in respect of any occurrence taking place other than on the ship or launches owned or operated by Carrier. Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention") which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property. If the Athens Convention or such exemptions and limitations are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply.

Each Passenger agrees to indemnify Carrier for any damages, liabilities, losses, penalties, fines, charges or expenses incurred or imposed upon Carrier as a result of any act, omission or violated of law by the Passenger or any minor Passenger for whom the Passenger is responsible.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**5]

Sometime in the early morning of July 10, 1999, Mr. Wallis disappeared from the Grand Princess. During this time, the ship was traveling towards Athens. No one saw Mr. Wallis fall overboard. By the time the Grand Princess docked in Athens, it was apparent that Mr. Wallis was missing from the ship. A certified statement from the Hellenic Coast Guard reports that a helicopter and multiple rescue boats were launched that day to search for Mr. Wallis. The distraught plaintiff initially remained on board, where she was given a sedative by the ship's physician and questioned by Greek police about her husband's disappearance. Plaintiff asserts that during this time, "Commodore Moulin [the ship's master] subjected [her] to remarks that her husband had fallen overboard; that he died in his fall from the ship; that his body would be sucked under the ship, chopped up by the propellers and probably would not be recovered." Later that afternoon, Commodore Moulin informed plaintiff that the Grand Princess was set to leave port at 5:30 p.m., and that she had a choice of disembarking or continuing with the cruise. Plaintiff chose to disembark and stay in Athens.

On July 16, 1999, Mr. Wallis' [**6] body washed ashore near Lavrio, Greece. The body was severely decomposed, but nothing in the record indicates that the body [*832] had been cut by propellers. Since Mr. Wallis' death, plaintiff has been diagnosed with depression and post-traumatic stress disorder. Plaintiff claims that she has recurring images of her husband being pulled under the ship and into its propellers.

Plaintiff filed this action against Princess in federal district court, alleging seven causes of action against Princess, including wrongful death under DOHSA, 46 U.S.C. §§ 761-767; intentional infliction of emotional distress; breach of contract; and fraud in various marketing materials. Princess moved for summary judgment striking all claims or, alternatively, for partial summary judgment limiting Princess' liability to the amount (approximately $ 60,000) prescribed by the Convention Relating to the Carriage of Passengers and Their Luggage by Sea ("Athens Convention"), incorporated by reference in paragraph 16 of the Passage Contract. On August 14, 2001, the district court granted Princess' motions for summary judgment on all claims except for the DOHSA claim, and granted the motion for partial [**7] summary judgment limiting Princess' liability. Plaintiff timely appealed the district court's grant of partial summary judgment on the amount of recoverable damages, and its grant of summary judgment on the claim for intentional infliction of emotional distress.

II. Discussion

A grant of summary judgment is reviewed de novo. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

A. Jurisdiction

Under 28 U.S.C. § 1292(a)(3), a court of appeal has jurisdiction over "interlocutory decrees of ... district courts ... determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." Princess contends that because the district court left for trial the issue of whether Princess was liable for a negligent search under DOHSA, the district court's decision below did not "determine the rights and liabilities of the parties" within the meaning [**8] of § 1292(a)(3). Therefore, according to Princess, the district court's decision is not subject to interlocutory review under § 1292(a)(3). We have jurisdiction to determine our

scope of jurisdiction. *See Breed v. Hughes Aircraft Co.*, 253 F.3d 1173, 1177 (9th Cir. 2001).

We have previously stated that " § 1292(a)(3) is an exception to the final judgment rule and, therefore, is construed narrowly. It permits appeals only when the order appealed from determines the rights and liabilities of the parties." *Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1136 (9th Cir. 2000), *cert. denied*, 532 U.S. 1007, 149 L. Ed. 2d 658, 121 S. Ct. 1733 (2001). At the same time, we have twice exercised jurisdiction to hear interlocutory appeals under this section when the district court has upheld the validity of a clause limiting the amount of liability but has not reached the question of whether the defendant was actually liable. *See Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989); *Vision Air Flight Service, Inc. v. M/V National Pride*, 155 F.3d 1165 (9th Cir. 1998).

In *Carman* [**9] *Tool*, defendants were sued for negligent handling of cargo. We wrote:

As an affirmative defense, [defendants] asserted that their liability, *if* [*833] *any*, is limited to $ 500 per package, pursuant to section 4(5) of COGSA [Carriage of Goods at Sea Act], 46 U.S.C. App. § 1304(5) (1982 & Supp. III 1985), the terms of the contract of carriage as contained in the bill of lading ...

All parties moved for partial summary judgment as to *whether defendants' liability is limited* to $ 500 per package. The district court granted partial summary judgment in favor of defendants, and plaintiffs took an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3) (1982).

871 F.2d at 899 (footnote omitted) (emphasis added). Although the district court in *Carman Tool* had made no determination as to whether the defendants were actually liable, we nonetheless exercised jurisdiction under § 1292(a)(3) to determine whether the defendants' potential liability was properly limited to $ 500 per package pursuant to COGSA.

Our case is procedurally and jurisdictionally identical to *Carman Tool*. As an affirmative defense, [**10] Princess asserted that its liability, if any, for the death of Mr. Wallis is limited to roughly $ 60,000 pursuant to its Passage Contract. Princess moved for partial summary judgment as to whether its liability is so limited, and the district court granted the motion. As in *Carman Tool*, the district court in our case has not decided whether Princess is actually liable for plaintiff's wrongful death claim. It has only decided that, if Princess were liable, its liability would be limited pursuant to the contract.

Similarly, in *Vision Air*, plaintiff sued the defendant carrier for having destroyed two trucks while unloading them from its ship. The defendant moved for partial summary judgment to cap its liability at $ 500 per truck pursuant to COGSA. The district court granted the defendant's motion, and the plaintiff appealed under § 1292(a)(3). We held that we had "jurisdiction to hear this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3), and review a partial grant of summary judgment de novo." 155 F.3d at 1168. We then vacated the district court's grant of partial summary judgment because the record contained evidence that could [**11] permit the conclusion that one of the two trucks had been destroyed intentionally. Intentional destruction would have constituted a "deviation" under maritime law and would have made COGSA's limitation of liability unavailable to the carrier. *Id.* at 1170-75.

It is reasonably clear from our opinion in *Vision Air* that the district court had not determined actual liability when we exercised jurisdiction over the interlocutory appeal. First, the district court had granted "partial" summary judgment in a case in which the only question was the liability of the defendant for the destruction of the trucks. If the district court had determined actual liability, as well as limitation of liability, summary judgment would not have been merely partial. Second, there is no indication anywhere in our opinion that the district court had decided anything other than the limitation of liability question; nor did we ourselves decide

anything other than that question.

Princess cites several out-of-circuit cases holding that § 1292(a)(3) requires a determination of actual liability by the district court. *See Evergreen Int'l (USA) Corp. v. Standard Warehouse*, 33 F.3d 420, 424 (4th Cir. 1994) [**12] (holding that § 1292(a)(3) should be construed narrowly to limit appeals to those cases where liability has been determined); *Bucher-Guyer AG v. M/V Incotrans Spirit*, 868 F.2d 734, 735 (5th Cir. 1989) (holding that the "decision whether the $ 500 COGSA limitation on damages applies in this case is not a [*834] decision determining the rights and liabilities of the parties" because even "if we were to hold that the $ 500 limit applies, we would still have to remand this case for a decision on whether the defendants were liable"); *Burgbacher v. Univ. of Pittsburgh*, 860 F.2d 87, 88 (3d Cir. 1988) (dismissing appeal under § 1292(a)(3) because "a liability determination has not been made").

We think that these other circuits have read § 1292(a)(3) too narrowly. We believe that we properly exercised jurisdiction in *Carman Tool* and *Vision Air*, and that we have jurisdiction over an interlocutory appeal under § 1292(a)(3) where, as here, only the validity and applicability of a provision limiting liability has been determined. If a district court holds that a limitation of liability clause is valid and applicable, that determination will, as a practical [**13] matter, usually end the case. For example, in a COGSA case, if the district court has held that a plaintiff can recover no more than $ 500 if actual liability is established, an economically rational plaintiff will not ordinarily pursue the case to judgment, and the correctness of the district court's determination of applicability of the liability limitation will never be reviewed.

Limitation of liability provisions are common in maritime cases, not limited to cases brought under COGSA. As we read § 1292(a)(3), it takes into account the practical problem posed by limitations of liability. Its explicit text of § 1292(a)(3) authorizes "interlocutory decrees." If the phrase "determination of the ... liabilities," which occurs later in the same text, were construed to exclude a determination of limitations of liability from "interlocutory decrees," such a construction would make interlocutory appeals impossible in many admiralty cases, and would do so in precisely those cases where such appeals are most needed. We therefore hold that we have jurisdiction to decide this interlocutory appeal.

B. Enforceability of Liability Limitation

A cruise line passage contract is a maritime contract [**14] governed by general federal maritime law. *See Milanovich v. Costa Crociere, S.p.A.*, 293 U.S. App. D.C. 332, 954 F.2d 763, 766 (D.C. Cir. 1992). The district court granted Princess' motion for partial summary judgment after concluding that the Passage Contract contractually limited Princess' liability to the amount prescribed by the Athens Convention through the following statement in paragraph 16: "Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention') which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property." Plaintiff argues that the Passage Contract's incorporation of the Athens Convention limitation is unenforceable because: 1) it is contrary to the public policy of the United States; and 2) it does not reasonably communicate the limitation of liability. We address plaintiff's arguments in turn.

Plaintiff first contends that 46 U.S.C. app. § 183c (a) [**15] prohibits Princess from enforcing passage contract provisions purporting to limit liability. n2 The statute reads, in relevant part:
[*835] It shall be unlawful for the manager, agent, master, or owner of any vessel *transporting passengers between ports of the United States or between any such port and a foreign port* to insert in any rule, regulation, contract, or agreement any provision or limitation ... purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury ... All such provisions or

limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c(a) (emphasis added). The parties do not dispute that the Grand Princess voyage upon which plaintiff and her husband sailed did not touch a United States port. Thus, the terms of § 183c(a) plainly do not apply to the Passage Contract of plaintiff's cruise. Further, the legislative [**16] history cited by plaintiff suggests a congressional intent, consistent with the text, to regulate all foreign carriers within the waters of the United States, but not to regulate foreign vessels in foreign waters. *See Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 915 (3d Cir. 1988) ("Congress, in Sections 183b and 183c, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment."), *overruled on other grounds by Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989); *Mills v. Renaissance Cruises, Inc.*, 1992 WL 471301 (N.D. Cal. Aug. 17, 1992) (same).

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n2 Princess argues that plaintiff may not raise this issue on this appeal because it was first raised in oral argument in district court. Not only does the case cited by Princess, *Moreno Roofing Co. v. Nagle*, 99 F.3d 340 (9th Cir. 1996), fail to support its contention that this court cannot consider an issue raised orally before the district court, but, as plaintiff also notes, this court has the power to consider arguments for the first time on appeal when "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1141 (9th Cir. 2001) (internal quotation marks omitted).

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Plaintiff next argues that the Passage Contract does not reasonably communicate the limitation so that a passenger can become meaningfully informed of its terms. In this circuit, we employ a two-pronged "reasonable communicativeness" test, adopted from *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983), to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. *See Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1363 (9th Cir. 1987) (applying First Circuit test for maritime cases to case involving air carrier); *see also Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir. 1992) (bringing *Deiro* analysis back to maritime cases). "The 'proper test of reasonable notice is an analysis of the overall circumstances on a case-by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake.'" *Deiro*, 816 F.2d at [*836] 1364 (quoting *Shankles*, 722 F.2d at 866). [**18] Whether the ticket provides reasonable notice is a question of law, which we review de novo. *See Dempsey*, 972 F.2d at 999.

The first prong of the reasonable communicativeness test focuses on the physical characteristics of the ticket. Here we assess "'features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.'" *Deiro*, 816 F.2d at 1364 (quoting *Shankles*, 722 F.2d at 864). We believe the physical characteristics of the ticket in this case are such that the terms and conditions are sufficiently conspicuous to the passenger. The reference to the Athens Convention liability limitation is buried six sentences into paragraph 16 in extremely small (1/16 inch) type. However, paragraph 16 is legible, and it carries the heading "16. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION." The "IMPORTANT NOTICE" warning headline reminds the passenger at least five times to read "SECTIONS 15 THROUGH 18." The pages upon which paragraph 16 is printed are marked with the words, "PASSAGE CONTRACT," in the upper right hand corner. Other courts [**19] have consistently

found tickets with similar physical features to have provided reasonable notice that contractual terms are contained therein. *See, e.g., Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7 (2d Cir. 1995); *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2d Cir. 1990); *Hodes*, 858 F.2d 905; *McQuillan v. "Italia" Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D.N.Y. 1974).

The second prong of the reasonable communicativeness test requires us to evaluate "'the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract.'" *Deiro*, 816 F.2d at 1364 (quoting *Shankles*, 722 F.2d at 865). "The surrounding circumstances to be considered include the passenger's familiarity with the ticket, *the time and incentive under the circumstances to study the provisions of the ticket*, and any other notice that the passenger received outside of the ticket." *Id.* (emphasis added). This prong allows us to examine more subjective, "'extrinsic factors indicating the passenger's *ability to become meaningfully informed.*'" *Id.* (quoting *Shankles*, 722 F.2d at 866) [**20] (emphasis added).

We believe the liability limitation at issue fails this second prong. It is undisputed that paragraph 16 itself does not specify a limitation to Princess' liability; the paragraph only references the "liability limitations ... applicable to [Princess] under the 'Convention Relating to the Carriage of Passengers [*837] and Their Luggage by Sea of 1976.'" It is also unclear from paragraph 16 whether the liability limitations applicable under the Athens Convention would necessarily apply, as the above incorporation is followed by the language, "*If the Athens Convention or such exemptions are held not to apply* for any reason, then all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply." (Emphasis added.)

A passenger wishing to inform herself of the nature of the possible liability limitation in paragraph 16 is likely to look up the "Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea," which was signed in 1974. The passenger would have to understand that paragraph 16, which specifies the date 1976 rather than 1974, refers [**21] to the Athens Convention *as amended in 1976*, requiring her to look up the 1976 "Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea." Upon finding the 1976 Protocol, the passenger would discover that Article 7, paragraph 1, of the Athens Convention, as amended by the 1976 Protocol, states in pertinent part: "The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 46,666 units of account per carriage." Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Nov. 19, 1976. The passenger would then have to look at Article 9 of the Athens Convention, as amended by the 1976 Protocol, to learn that a "Unit of Account" is the same as a "Special Drawing Right as defined by the International Monetary Fund" and that "the amount[]mentioned in Article[]7 ... shall be converted into the national currency of the State of the Court seized of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the Parties." *Id.* The passenger presumably would have no way of predicting when a potential "date of ... [**22] judgment" would be, but if the passenger wished to calculate a value for 46,666 Special Drawing Rights ("SDR"s), she would have to learn the meaning of the term, and would then have to check a financial source tracking the daily conversion rate for an SDR. n3 Only after such research would the passenger have any sense of the estimated limitation on Princess' liability in the event of personal injury or death - assuming, that is, that the Athens Convention even applied. The United States is not a signatory to the 1974 Convention or the 1976 Protocol. We think it is unrealistic to assume the average passenger with no legal background would even attempt to analyze the conditions under which the Athens Convention would or would not apply. n4

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n3 The conversion rate on September 16, 2002: was 1 SDR = 1.31288 U.S. Dollars. *See http://www.imf.org.* This accords with the parties' estimated value of $ 60,000 for 46,666 SDRs.

n4 According to Article 2 of the Athens Convention:
1. This Convention shall apply to any international carriage if:

(a) the ship is flying the flag of or is registered in a State Party to this Convention, or

(b) the contract of carriage has been made in a State Party to this Convention, or

(c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

2. Notwithstanding paragraph 1 of this Article, this Convention shall not apply when the carriage is subject, under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea.

Athens Convention Relating to the Carriage of Passengers and Their Carriage by Sea, Dec. 13, 1974. Article 22 provides that any party may declare in writing that it will not give any effect to the Athens Convention when the passenger and the carrier are subjects or nationals of that party. *Id.*

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We are persuaded that the average passenger has little incentive to invest sufficient effort to approximate the value of what she would be led to regard (by the language of paragraph 16 itself) as only a potentially binding term of the Passage Contract. Under the reasonable communicativeness test, a disincentive "to study the provisions of the ticket" is considered an extrinsic factor impeding "the passenger's ability to become meaningfully informed." Moreover, even if a passenger were motivated to undertake such effort, it would require some legal and financial sophistication, which are additional extrinsic factors, to research the liability limitation reference in paragraph 16. For this reason, we hold that Princess' incorporation of the Athens Convention liability limitation does not satisfy the second prong of the reasonable communicativeness test.

Our holding is consistent with our previous decisions in *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806 (9th Cir. 1982), and *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287 (9th Cir. 1997). In *Komatsu*, a district court found an ocean carrier liable for damage to the plaintiffs' cargo. One [**24] of the issues raised on appeal was "whether an ocean carrier is entitled to the [*838] damage limitation in COGSA § 4(5) if it incorporates by reference COGSA into its bill of lading." *Komatsu*, 674 F.2d at 808. We held that the defendant was not entitled to the liability limitation as a matter of law, and rejected the defendant's argument that:

"an experienced shipper should be deemed to have knowledge of an opportunity to secure an alternative freight rate, and higher carrier liability by reason of his knowledge of COGSA, 46 U.S.C. § 1304(5), made applicable by a 'Paramount Clause' in the bill of lading, *where such opportunity does not present itself on the face of the bill of lading*. The bill of lading is usually a boilerplate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively low-level shipping employee. *We feel that imputing such knowledge of COGSA applicability and provisions to such an employee is an assumption that may go beyond the bounds of commercial realism.*"

674 F.2d at 809-10 (emphasis added) (quoting *Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co.*,

559 F.2d 1173, 1177 (9th Cir. 1977)). [**25] It would make little sense to hold that a reference to a federal shipping statute provides insufficient notice to an employee of an experienced shipper, but that a reference to a foreign treaty provides sufficient notice to a non-commercial passenger who may take a cruise only once or twice in her lifetime.

In *Chan*, we held that "cruise passenger tickets are contracts of adhesion, and as such, ambiguities in them must be construed against the carrier." *Chan*, 123 F.3d at 1292. We refused to enforce a clause absolving a carrier's responsibility for personal injuries because of ambiguous language in the purported disclaimer. The problem with the contract terms in the Passage Contract in this case may be that they are opaque rather than ambiguous. But opaqueness, like ambiguity, obscures the meaning of an instrument that "in case of doubt ... is to be taken against the party that drew it." *Rams v. Royal Caribbean Cruise Lines, Inc.*, 17 F.3d 11, 12 (1st Cir. 1994) (internal quotation omitted), *cited in Chan*, 123 F.3d at 1292).

Princess asserts in its brief that in *Chan v. Korean Air Lines*, 490 U.S. 122, 104 L. Ed. 2d 113, 109 S. Ct. 1676 (1989), [**26] the Supreme Court held that "a limitation amount need not be stated in the airline ticket at all; only a statement the transportation was subject to the [Warsaw] Convention was needed." We believe this assertion misrepresents the holding of the case. In *Korean Air Lines*, plaintiffs brought wrongful death actions against Korean Airlines ("KAL"). All parties agreed that their rights were governed by the multilateral treaty known as the Warsaw Convention. A private accord among airlines, known as the Montreal Agreement, required carriers to give notice of the Warsaw Convention's damages limitation for personal injury or death in print size no smaller than 10-point type. The issue in *Korean Air Lines* was whether the treaty imposed a sanction eliminating the damages limitation when the requirement of the Montreal Agreement was not met. (The Warsaw Convention's liability rules were printed on KAL's passenger tickets in 8-point type instead of 10-point type.) The Court held that nothing in the plain language of the Montreal Agreement or the Warsaw Convention provided elimination of the damages limitation as the sanction for defective notice. The Court based its conclusion on its [**27] interpretation of a treaty's text, not on reasonable notice principles applicable to maritime contracts. The Court did *not* hold that a passage [*839] contract need not provide notice of liability limitations.

Furthermore, unlike the Warsaw Convention, the Athens Convention has never been ratified by the United States. Therefore, unlike the Warsaw Convention, the Athens Convention carries no force of law on its own. *See Chan v. Soc'y Expeditions*, 123 F.3d at 1296. The limitation of liability provision of the Athens Convention is legally enforceable only as a term of a legitimate contract. As such, an Athens Convention limitation must be reasonably communicated before it can bind a passenger under federal maritime law.

Almost all of the remaining cases Princess cites in support of its claims that "the terms and conditions of Princess' ticket contract have repeatedly been found 'reasonably communicative' "and that "other cruise line ticket contracts which are substantially similar or identical to Princess' have also routinely met the 'reasonable communicative' test as a matter of law," the nature and/or amount of the limitation in question was *explicitly stated in the* [**28] *contract. See Effron*, 67 F.3d 7 (express forum selection clause); *Dempsey*, 972 F.2d 998 (express time limitation clause); *Spataro*, 894 F.2d 44 (express time limitation clause); *Sharpe v. W. Indian Co., Ltd.*, 118 F. Supp. 2d 646 (D.V.I. 2000) (enforcing express time limitation clause but construing ambiguities in another clause *against* drafter); *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083 (N.D. Cal. 1999) (express forum selection clause), *modified on other grounds*, 107 F. Supp. 2d 1135 (N.D. Cal. 2000); *Bounds v. Sun Line Cruises, Inc.*, 1997 AMC 25 (C.D. Cal. 1996) (express forum selection clause); *Osborn v. Princess Tours, Inc.*, 1996 U.S. Dist. LEXIS 22436, 1996 AMC 1481 (C.D. Cal. 1996) (express time limitation clause); *Osborn v. Princess Tours, Inc.*, 1995 AMC 2119 (S.D. Tex. 1995) (express forum selection clause); *Roberson v. Norwegian Cruise Line*, 897 F. Supp. 1285 (C.D. Cal. 1995) (express forum selection clause); *Melnik v. Cunard Line Ltd.*, 875 F. Supp. 103 (N.D.N.Y. 1994) [**29] (express forum selection clause); *Berg v. Royal Caribbean Cruise Ltd.*, 1992 WL 609803 (D.N.J. Feb, 20, 1992) (express time limitation clause); *Miller v. Regency Maritime Corp.*, 824 F. Supp. 200 (N.D. Fla. 1992) (express forum selection clause); *Mills*, 1992 WL 471301 (provision explicitly limiting liability for personal injury or death to "S.D.R. 46,666"); *Becantinos v. Cunard*

Line Ltd., 1991 U.S. Dist. LEXIS 5272, 1991 WL 64187 (S.D.N.Y.) (passage contract appears to have explicitly limited recovery value to 530 British pounds); and *McQuillan*, 386 F. Supp. 462 (express time limitation clause).

Finally, we note that our holding is not precluded by the Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991). In *Shute*, the Court held that a forum selection clause in a cruise line's passage contract was reasonable and enforceable despite the facts that the clause was not the product of negotiation, and that respondents were physically and financially incapable of litigating in the selected forum. The Court expressly stated in *Shute* that:

We [**30] *do not* address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially *have conceded that they had notice of the forum-selection provision.* Brief for Respondents 26 ("The respondents do not contest the incorporation of the provisions nor [*sic*] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated").

[*840] *Shute*, 499 U.S. at 590 (emphasis added). As the opinion makes clear, the Court in *Shute* evaluated the enforceability of the forum selection clause under the assumption that it was reasonably communicated to the plaintiffs. We have been asked to decide an antecedent issue: whether the contract term in question was reasonably communicated in the first place. We now decide that issue, and hold that a passage contract clause that merely references the "'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention')" without providing an approximate monetary limitation does not meaningfully inform a passenger of a liability limitation, and is [**31] therefore unenforceable.

C. Intentional Infliction of Emotional Distress

1. Choice of Law

In granting summary judgment to defendants on plaintiffs' claim for intentional infliction of emotional distress, the district court assumed without discussion that the claim is governed by general maritime law. Plaintiff argues on appeal that the district court should have applied California law instead because her claim, based on "the outrageous verbal conduct of Defendants and their failure to provide promised legal counsel or psychological assistance," "does not implicate the traditional areas of the admiralty bar's expertise nor does it threaten to effect [*sic*] maritime commerce."

The Supreme Court held in *Sisson v. Ruby*, 497 U.S. 358, 111 L. Ed. 2d 292, 110 S. Ct. 2892 (1990), that general maritime law governs a tort claim when conditions of location and connection to maritime activity are satisfied. "A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 130 L. Ed. 2d 1024, 115 S. Ct. 1043 (1995). [**32] The connection test requires the court to analyze two issues: 1) "whether the incident has 'a potentially disruptive impact on maritime commerce'"; and 2) "whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Id.* (internal citations omitted).

Plaintiff does not dispute that the facts underlying her claim satisfy the location test. Plaintiff argues, however, that because her claim is based primarily on the verbal conduct of crewmembers and not on any acts or omissions related to the search and rescue for Mr. Wallis, the "incident" underlying her claim is not substantially related to traditional maritime activity. We believe that plaintiff focuses too narrowly on the

particular causes of the alleged harm, and hold that the general "activity giving rise to the incident" satisfies the connection test. *Sisson*, 497 U.S. at 364. The Court emphasized in *Sisson* that:

our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but *by the general conduct* from which the incident arose." In [**33] *Executive Jet* [*Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972)],for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally.

Id. (emphasis added). Similarly, the relevant activity in this case is not simply the crewmembers' verbal conduct or the omitted legal and psychological assistance, but a cruise ship's treatment of passengers generally. A cruise line's treatment of [*841] paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity. Hence, the district court did not err in applying general maritime law to plaintiff's claim for intentional infliction of emotional distress.

2. Merits

Noting that there is no maritime law concerning a claim for intentional infliction of emotional distress, the district court measured the sufficiency of Plaintiff's claim under the Restatement (Second) of Torts § 46. Although we have held that claims for emotional distress are cognizable under admiralty law, *see Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994), there appears to be [**34] no established maritime standard for evaluating such claims. *See Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 n. 3 (1st Cir. 1988) ("The district court applied Maine law because there is no rule of law in maritime law on infliction of emotional distress."); *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159, 164 (S.D.N.Y. 1994) ("There is no maritime law concerning plaintiffs' claim that defendants' conduct surrounding the subsequent investigation constituted the intentional infliction of emotional distress."). We have the authority to develop general maritime law regarding claims not directly governed by congressional legislation or admiralty precedent. *Chan*, 39 F.3d at 1409; *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-1, at 146 (3d ed. 2001) ("When new situations arise that are not directly governed by legislation or admiralty precedent, federal courts may fashion a rule for decision by a variety of methods. Federal courts may, and often do, look to state statutory law and to precepts of the common law which they 'borrow' and apply as the federal admiralty rule." (footnote omitted)). While we do [**35] not regard the Restatement (Second) of Torts as the only source of maritime law governing claims for intentional infliction of emotional distress, we recognize that it has been regularly employed by other courts to evaluate intentional infliction of emotion distress claims in federal maritime cases. *See, e.g.*, *Ellenwood v. Exxon Shipping* Co., 984 F.2d 1270, 1283 n. 23 (1st Cir. 1993); *York*, 863 F. Supp. at 164; *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F. Supp. 837, 851-52 (D. Haw. 1992). We will do the same.

Section 46 of the Restatement states in pertinent part: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Comment d elaborates:
The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct [**36] has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Restatement (Second) of Torts § 46 cmt. d (1965) (emphasis added).

[*842] The facts surrounding plaintiff's claim for intentional infliction of emotional distress are disputed, but if viewed in the light most favorable to plaintiffs (the nonmoving party), the evidence would show that during the morning of Mr. Wallis' disappearance, Commodore Moulin stated to someone else, but in plaintiff's hearing, that Mr. Wallis was probably dead and that his body would be sucked under the ship, chopped up by the propellers, and probably not be recovered. The evidence would also show that Princess neglected to provide legal assistance [**37] when plaintiff was questioned by Greek authorities or to provide emotional counseling when she became hysterical.

We believe the district [*776] court was correct when it found that the above conduct was not "extreme and outrageous." As the district court noted, while the statements and other behavior of Commodore Moulin and the crewmembers were unsympathetic, "there is nothing in the record to support a finding that anybody from Princess went out of their way to torment or mistreat the Plaintiff in a manner that our society could view as utterly deplorable." Indeed, there is no evidence that Commodore Moulin directed his statement to plaintiff or even purposely made it within her hearing. As the district court explained, "officials are often forced with the unenviable task of asking difficult questions at sensitive times or explaining gruesome contingencies."

The standard for intentional infliction of emotional distress under § 46 of the Restatement is extremely difficult to meet and has not been met here. *See, e.g., York*, 863 F. Supp. 159 (ship's failure to notify authorities of cruise passenger's rape claim, ship's misrepresentation of examining doctor, and ship's misrepresentation [**38] of applicable law not found to be outrageous); *Visconti v. Consol. Rail Corp.*, 801 F. Supp. 1200 (S.D.N.Y. 1992) (plaintiff's allegations of 54 separate incidents of harassment and abuse - including harassment and belligerence by her managers; fabrications of work rule violations and insubordination; false charges of reproduction and removal of confidential documents; laughter and humiliation in front of coworkers; and obscene language and phone calls - failed to constitute "outrageous behavior"). We therefore hold that the district court properly granted Princess' motion for summary judgment on this claim. n5

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n5 Because we agree that the district court properly granted Princess' motion for summary judgment on the intentional infliction of emotional distress claim, we do not need to reach Princess' alternative argument that the claim is preempted by DOHSA.

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Conclusion

For the foregoing reasons, we REVERSE the district court's grant of partial summary judgment limiting Princess' liability, AFFIRM [**39] the district court's grant of summary judgment on the claim for intentional infliction of emotional distress, and REMAND for further proceedings consistent with this opinion.

Each side will bear its own costs.

Casvant v. Norwegian Cruise Line, Ltd., 63 Mass.App.Ct. 785 (Mass.App. 06/30/2005)

[1] Court of Appeals of the State of Massachusetts

[2] No. 04-P-47

[3] 63 Mass.App.Ct. 785, 2005.MA.0000221< http://www.versuslaw.com>

[4] June 30, 2005

[5] **MARK CASAVANT & ANOTHER*FN1**
v.
NORWEGIAN CRUISE LINE, LTD.

[6] John D. Deacon, Jr., for the plaintiffs.

[7] Barbara P. Lazaris for the defendant.

[8] The opinion of the court was delivered by: Berry, J.

[9] Worcester.

[10] September 9, 2004

[11] Present: Laurence, Brown, & Berry, JJ.

[12] Conflict of Laws. Practice, Civil, Motion to dismiss, Choice of forum, Summary judgment. Contract, Choice of forum clause, Offer and acceptance.

[13] Admiralty.

[14] Civil action commenced in the Superior Court Department on October 3, 2002.

[15] The case was heard by James P. Donohue, J., on motions for summary judgment.

[16] The plaintiffs, Mark and Tara Casavant, appeal from the dismissal of their complaint against the defendant, Norwegian Cruise Line, Ltd. (Norwegian), which sought to recover payment for a cruise scheduled to depart from Boston on September 16, 2001. In the aftermath of the September 11, 2001, terrorist hijacking of airplanes that originated from Boston's Logan Airport and smashed into and destroyed the twin towers at the World Trade Center in New York City, killing nearly 3,000 people, the Casavants were fearful of going on the cruise,*fn2 which was to embark from Boston Harbor.

[17] 1. Background

[18] According to the verified complaint, in September, 2001, approximately a week after receiving the ticketing contract, the Casavants communicated with Norwegian"to inform [Norwegian] that they were unwilling to proceed with the September 16 voyage, and to request rescheduling of their cruise to a later date." Three additional such requests were transmitted by the Casavants. All were denied by Norwegian. The Casavants then followed with a letter dated September 17, 2001, in which they reiterated their trepidations.

[19] "The fact that Massport has responsibility for security at the Black Falcon Pier and Logan Airport in Boston contributed to our trepidation. After all, this was the place where two of the hijacked planes originated with sixteen terrorists aboard. As events continued to unfold it became apparent that security had been lax for some time. It also became evident that Boston was identified by the terrorists as a prime target. This became more clear with the bomb scare in Boston Harbor on Sunday September 16, 2001."

[20] Norwegian responded by letter dated October 11, 2001, refusing "to honor your request for a refund or credit" and taking the position that passengers should obtain travel insurance "to cover unforseen circumstances."

[21] The Casavants commenced this litigation. In addition to its answer and counterclaim,*fn3 Norwegian also filed a motion to dismiss the complaint based on a forum selection clause set forth in the ticketing contract, which required that litigation be filed in Florida. Judgment entered dismissing the complaint based on this forum selection clause.

[22] The record reflects that Norwegian had not provided information concerning the forum selection clause -- or for that matter, the contractual terms and conditions, including limitations on Norwegian's liability -- until close to one year after the original booking, two months after full payment of the $2,017.50 cruise price, and approximately thirteen days before the sail date.*fn4 The first time the purported contractual terms were forwarded to the Casavants was in a document entitled "passenger ticket contract," which document was received by the Casavants in September, 2001. The contractual terms are set forth in two pages of fine print in the ticketing document.*fn5 A box on the first page states that: "Acceptance of this Passenger Ticket Contract by Passenger shall constitute the agreement of Passenger to these Terms and Conditions."*fn6 The forum selection clause appears in par. 28 on the second page of the ticketing contract.*fn7

[23] Because the manner and means of the delivery of the terms of the contract for passage did not fairly allow the Casavants "the option of rejecting the contract with impunity," Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991), and because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contract, under controlling Federal maritime law and Massachusetts contractual law, the Florida-dictated forum selection clause is not enforceable. Suit may therefore proceed in the Massachusetts courts. Accordingly, we reverse the judgment.

[24] 2. Procedural Error in the Allowance of Norwegian's Motion

[25] Apart from the substantive error of law concerning whether there existed a binding contract so that the forum selection clause was operative -- an issue we address in part 4 -- there was also a fundamental error in the Superior Court's judgment dismissing the complaint: that is, the allowance of judgment without providing the Casavants an opportunity to respond to Norwegian's motion. The procedural background underlying this error is as follows.

[26] On November 18, 2002, citing the forum selection clause, Norwegian served upon the Casavants' counsel a motion seeking dismissal of the Massachusetts action, accompanied by the affidavit of one Jane E. Kilgour, the manager of Norwegian's passenger and crew claims department. The motion was a "speaking" motion, also serving as a memorandum of law and setting forth legal argument, case law citations, and the reasons why Norwegian contended that judgment should enter enforcing the forum selection clause, based on the averments in the Kilgour affidavit.

[27] At the outset, we note that such a motion, predicated upon enforcement of a forum selection clause that would have placed venue exclusively in Florida, in legal effect, seeks not a venue change to such other forum. Rather, such a motion is, in legal effect, a motion to dismiss for failure to state a claim assertable within the State of filing based on contractual limitations allegedly agreed to by the parties. Accordingly, such a motion is properly pleaded under Mass.R.Civ.P. 12(b)(6), 365 Mass. 755 (1974). This is consistent with Federal practice wherein Fed.R.Civ.P. 12(b)(6) is the operative procedural rule for dismissal motions predicated on forum selection clauses. See, e.g., LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 6-7 (1st Cir. 1984) (motion to dismiss based on forum selection clause was not one predicated upon jurisdiction or venue, but instead sought to enforce a contractual stipulation; therefore, the motion should have been brought under Rule 12[b][6], rather than under Rules 12[b][1] and 12[b][3]). Accord Doe v. Seacamp Assn., 276 F. Supp. 2d 222, 224 n.2 (D. Mass. 2003).

[28] Motion practice under our Massachusetts rules of civil procedure tracks the Federal rules. Rollins Envtl. Servs., Inc. v. Superior Ct., 368 Mass. 174, 179-180 (1975). In addition, the Supreme Judicial Court has adopted the Federal approach in judicial review of forum selection clauses, as "involv[ing] neither venue nor jurisdiction in the traditional sense." Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 576 n.6 (1995). For these reasons,

we believe that, in accord with Federal procedural practice and our State motion practice, Mass.R.Civ.P. 12(b)(6)*fn8 governs when a party seeks to enforce a forum selection clause. This is particularly apt in cases involving forum selection clauses subject to Federal maritime law because, as shall be discussed infra, Federal maritime law controls with respect to resolution of legal issues for which there are governing Federal law pronouncements.

[29] Although Mass.R.Civ.P. 12(b)(6) was the pertinent procedural mechanism in this case, Norwegian's motion went beyond the confines of that rule. Given Norwegian's extra-complaint submissions, the dismissal motion should have been treated as a motion for summary judgment. See note 10, infra. In timely response thereto, on December 6, 2002, the Casavants served an opposition and a cross motion for summary judgment. This is consistent with the twenty-one day time frame set forth in Superior Court Rule 9A(a)(2)(B). However, on December 3, 2002, three days before receipt of the Casavants' summary judgment opposition, and in violation of Superior Court Rule 9A(b)(2), Norwegian filed its moving papers directly with the Superior Court. To neutralize the error in Norwegian's unilateral filing, the Casavants, in turn, on December 9, mailed their opposition to the Superior Court, which opposition was received in that court on December 10, 2002. However, on December 9, 2002, the day before receipt of the Casavants' opposition and based on the one-sided filings of Norwegian, the Superior Court judge entered an order dismissing the Casavants' complaint.*fn9 The dismissal relied on the extra-complaint materials that were incorporated in the Norwegian memorandum of law.

[30] Because the Norwegian motion filing included extra-complaint materials concerning the forum selection clause, and because the judge relied on these supplemental extra-complaint filings in entering dismissal, the ultimate dismissal was, in law, a summary judgment. That being so, the provisions of Mass.R.Civ.P. 56, 365 Mass. 824 (1974), should have been followed. See Mass.R.Civ.P. 12(b).*fn10 They were not, and this fundamental procedural error undermines the stability of the judgment. See Central Contr. Co. v. Maryland Cas. Co., 367 F.2d 341, 343 (3d Cir. 1966) (motion to dismiss based on forum selection clause, which was accompanied by parties' affidavits, would be considered by reviewing court as one for summary judgment). Compare Paredes v. Princess Cruises, Inc., 1 F. Supp. 2d 87, 89 (D. Mass. 1998) (under Fed.R.Civ.P. 12[b][6], cruise line's motion to dismiss based on shortened limitations period in passenger ticket contract treated as one for summary judgment because judge considered matters outside the pleadings).*fn11

[31] We do not rest our decision reversing the judgment on this procedural error alone. For, in addition to the procedural flaw involving the manner in which the Norwegian motion was unilaterally presented to, and ruled on, by the lower court, there was also substantive error of law with respect to the lower court's truncated analysis of Federal maritime law and State contractual law as affecting the enforceability of the forum selection clause. Among other substantive law errors, there was no judicial analysis of the pivotal Federal maritime law issues and the issue of law concerning whether the passenger ticketing document was under State law an enforceable contract in the first place. Instead, in relying exclusively on the arguments in the Norwegian memorandum and affidavit, the motion judge accepted the proposition that, simply because a forum selection clause appeared in the passenger ticket, a lawsuit was barred in Massachusetts and the complaint was subject to dismissal. This is

incorrect, and we turn, then, to this substantive error of law, which renders the judgment reversible.

[32] 3. Standard of Review

[33] Treating the judge's decision as an award of summary judgment, and, consistent with Federal practice in the realm of maritime forum selection clauses, we review de novo to determine whether there exist genuine issues of material fact and whether, based on the forum selection clause, Norwegian was entitled to dismissal of the Casavants' complaint. See, e.g., Jimenez v. Peninsular & Oriental Steam Nav. Co., 974 F.2d 221, 222 (1st Cir. 1992) (de novo review of summary judgment based on shorter limitations period in passenger ticket); Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 387 (1st Cir. 2001) (de novo review of dismissal based on forum selection clause in employment contract).

[34] 4. The Intersections Between Federal Maritime Law and Massachusetts Contract Law

[35] It has long been held that legal issues involving a passenger ticket contract for a cruise, which is a maritime contract, present matters arising in admiralty, as to which Federal maritime law preempts and controls. See Jansson v. Swedish Am. Line, 185 F.2d 212, 216 (1st Cir. 1950) (whether filed in State or Federal Court, litigation involving cruise passenger ticket contract presents matters of maritime law, "of which the ultimate expositor is the Supreme Court of the United States"); Jimenez v. Peninsular & Oriental Steam Nav. Co., 974 F.2d at 223 n.4. See also Milanovich v. Costa Crociere, S.P.A, 954 F.2d 763, 766 (D.C. Cir. 1992); Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 132 (3d Cir. 2002); Vavoules v. Kloster Cruise Ltd., 822 F. Supp. 979, 982-983 (E.D.N.Y. 1993), and cases cited.

[36] However, in these admiralty-based matters, while Federal maritime law is the force which controls the tides within shipping and cruise lanes, there are certain substantive law currents into which Federal law has not flowed and does not chart the legal course. In these non-Federal law currents, State law applies. Put another way, where Federal maritime law is silent on a particular substantive law issue, State substantive law applies. See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313 (1955) (much regulatory power in the field of maritime contracts has been left to the States); Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1279 (1st Cir. 1993); Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 54 (1st Cir. 1995). See also Jimenez v. Peninsular & Oriental Steam Nav. Co., 974 F.2d at 223 (applying State law to interpretation of maritime contract's terms).

[37] We first address the preemptive and supremacy based principles of developed Federal maritime law, which control forum selection clauses affecting cruises, such as in this case. We then consider that part of the legal tidelands where Federal law has ebbed and into which flows State contract law concerning what constitutes acceptance of a contract, here, the issue being whether the Casavants accepted the ticketing contract within which the forum selection clause appears.

[38] a. Federal Maritime Law Concerning Forum Selection Clauses in Shipping Contracts

[39] In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the United States Supreme Court considered the enforceability of forum selection clauses in commercial maritime contracts. The Court held that, as matter of Federal law, such forum selection clauses in business maritime contracts will be given effect, so long as the clause is "unaffected by fraud, undue influence, or overweening bargaining power," id. at 12, and enforcement of the clause would not be "unreasonable and unjust." Id. at 15. Our Supreme Judicial Court adopted The Bremen analysis in Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572 (1995), and changed Massachusetts law, holding that "forum selection clauses are valid and enforceable, except when it is shown that enforcement would be unreasonable" (emphasis supplied). Id. at 574.*fn12 In doing so, the Supreme Judicial Court "accept[ed] the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so" (emphasis supplied). Id. at 574-575. Accord Restatement (Second) of Conflict of Laws § 80 (rev. ed. 1988) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable"), quoted in Jacobson, 419 Mass. at 575.

[40] In its analysis of the enforceability of such a clause in the commercial maritime context, the Supreme Court, in The Bremen, observed that what was at issue was a maritime shipping contract between businesses, each of which possessed bargaining power exercisable in negotiations that ultimately would set the material points of the maritime transport contract. There was, according to the Court, "strong evidence that the forum clause was a vital part of the agreement . . . it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations" (footnote omitted). 407 U.S. at 14.

[41] In contrast to business-to-business deals, in private passenger maritime cruise contracts, the bargaining power of the passenger vis-à-vis the commercial cruise line is de minimis, differing greatly from that of dueling business entities engaged in negotiating the terms for commercial maritime shipping, such as were at issue in The Bremen. This disparity between commercial shipping contracts and private cruise ticketing contracts with forum selection clauses was, post The Bremen, considered by the Supreme Court in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-595 (1991), wherein the Court likened the forum selection clause in a private cruise contract to a contract of adhesion. "[I]t would be entirely unreasonable for us to assume that respondents -- or any other cruise passenger -- would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket." Id. at 593. Accordingly, in connection with the enforceability of forum selection clauses in private cruise tickets, the Court acknowledged the necessity for some refinement of The Bremen analysis "to account for the realities of form passage contracts." Ibid.

[42] Among the judicial refinements crafted by the Court in the private cruise context was the imposition of a heightened judicial standard of review, with "emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness" (emphasis supplied). Id. at 595. In addition, beyond The Bremen's commercial requirements that a forum selection clause must be "unaffected by fraud, undue influence,

or overweening bargaining power," 407 U.S. at 12, in Carnival Cruise, the Court weighed whether the cruise ticketing contract, with the embedded forum selection clause, was reasonably and timely communicated to the passenger, so as to yield sufficient notice, giving the passenger the opportunity to "reject[] the contract with impunity."*fn13,*fn14 499 U.S. at 595.

[43] In the wake of Carnival Cruise, the Federal courts have decided a number of cases which establish that, for vacation cruise ticketing contracts, in order for the passenger to be bound by the forum selection clause under Federal maritime law, the private ticket cruise buyer must be given reasonable time within which to act and to reject the ticketing contract and forum selection clause, without incurring disproportionately unfair penalties for such a rejection.*fn15

[44] The "refined" standards in Carnival Cruise, applicable to a private cruise ticketing contract, as matter of Federal maritime law -- i.e., timely delivery to yield sufficient notice, with a corresponding opportunity for the passenger to reject the ticketing contract and forum selection clause with impunity -- were not met in this case. As previously noted, the record reflects the Casavants received the passenger ticket contract on or about September 3, 2001, some thirteen days before the scheduled departure date of September 16, 2001. Although Norwegian averred in an affidavit, see note 19, infra, that passengers could cancel their cruises without penalty, when the Casavants sought to have Norwegian reschedule or refund the cruise price after the September 11 terrorist attack -- an expeditious request by the Casavants in light of the limited time that the ticketing contract was in their possession and the blackout of any prior information -- rather than being afforded the opportunity to reject the contract with impunity, the Casavants were subjected to punitive measures.

[45] b. State Law and the Norwegian Implied Acceptance Theories

[46] Norwegian seeks to distance itself from the potential invalidity of the forum selection clause under Federal Law by arguing that the Casavants knowingly accepted the ticketing contract, creating a binding agreement. We turn now to Norwegian's arguments that the Casavants should be deemed to have impliedly accepted the passenger ticket contract, thereby giving a binding effect to the forum selection clause. These claims of implied contract acceptance are to be reviewed under Massachusetts law, since Federal maritime law is silent and has not occupied the field.*fn16 See part 4, supra.

[47] "'[O]rdinarily, the question of whether a contract has been made . . . is for the jury,' except where 'the words and actions that allegedly formed the contract [are] so clear themselves that reasonable people could not differ over their meaning'" (citations omitted). McGurn v. Bell Microprods., Inc., 284 F.3d 86, 93 (1st Cir. 2002) (applying Massachusetts law). See David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc., 8 Mass. App. Ct. 237, 239 (1979). We do not see in "the words and actions" of the Casavants reflection of such acceptance as Norwegian advances. See generally I&R;Mechanical, Inc. v. Hazelton Mfg. Co., 62 Mass. App. Ct. 452, 455 (2004), citing Restatement (Second) of Contracts § 50(1) (1981) ("[a]n offer ripens into a binding contract when it is accepted").

[48] First, Norwegian argues that the Casavants are presumed to have accepted the contractual terms because of the Casavants' initial silence upon receipt of the ticketing contract. We reject this presumption. "Acceptance by silence is exceptional." Restatement (Second) of Contracts § 69 comment a. See McGurn v. Bell Microprods., Inc., 284 F.3d at 90 ("[A]s a general rule, silence in response to an offer to enter into a contract does not constitute an acceptance of the offer"). Norwegian also argues that the Casavants must be deemed to have accepted the ticketing contract by failing to voice particularized objection to specific terms and conditions. The argument is unavailing -- indeed borders on the ephemeral -- the Casavants' repeated requests to reschedule the cruise and their reasons set forth in the September 17 letter were sufficient objection.*fn17

[49] In this respect, the Carnival Cruise standard of judicial scrutiny for fundamental fairness confirms our view of the unenforceability of this clause where the course of conduct of Norwegian was unreasonable and unjust. Here the ticket purchasers took no affirmative action to accept the contract, but rather to the contrary, in fact expressly rejected the services offered in the contract due to legitimate safety concerns stemming from the catastrophic events of September 11, 2001. In these circumstances, as there was neither under Federal maritime law, the allowance of an opportunity for the Casavants to reject the ticketing contract "with impunity," nor, under State contract law, did the Casavants' actions give rise to an accepted contract, we conclude that the forum selection clause is unenforceable.*fn18 See generally Rams v. Royal Caribbean Cruise Lines, Inc., 17 F.3d 11, 12 (1st Cir. 1994) (fact that contract under review was maritime contract did not "change the ordinary strictures governing [appellate court's] plenary review of the meaning of a written contract"). Accordingly, judgment for Norwegian should not have entered.

[50] 5. Open Issues

[51] Whether their rejection of the passenger ticket contract entitled the Casavants to a full refund of the ticket price under Norwegian's own policy is a matter for the fact finder at trial. Assuming the facts to be as the Casavants allege, a fact finder may decide that the Casavants are entitled to a full refund under Norwegian's policy, which policy was first disclosed in the Kilgour affidavit attached to Norwegian's motion to dismiss -- albeit not honored in this case. According to this Norwegian affidavit,*fn19 the policy is to fully refund the ticket price, if rejection precedes the beginning of the voyage. Compare Lurie v. Norwegian Cruise Lines, Ltd., 305 F. Supp. 2d 352, 358 (S.D.N.Y. 2004).

[52] Also remaining for trial is the Casavants' claim against Norwegian for unfair or deceptive practices, pursuant to G. L. c. 93A. Although this is a maritime case, the "savings clause" of 28 U.S.C. § 1333 (2004), preserves State law remedies that do not contravene maritime law.*fn20 See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 626 (1st Cir. 1994). We discern no contravention to established maritime law on the legal issue whether Norwegian may have violated G. L. c. 93A.

[53] Judgment reversed.

[54] Order denying motion for reconsideration vacated.

[55] BROWN, J. (concurring).

[56] The panel became aware at oral argument (and made it known) of the situation that was causing Norwegian's counsel much "embarrassment." (See note 9, majority opinion, ante.) Notwithstanding the court's suggestion that counsel would be well advised to attempt to settle this matter amicably, rather than pursue it further in the courts, no postappellate action was sought or even requested (as far as can be discerned from the record). Cf. Liberty Mut. Ins. Co. v. Nippon Sanso K.K., 331 F.3d 153, 163 (1st Cir. 2003) (Boudin, C.J.) ("This case is about money, but only money, and should have been settled . . . "). Thus, Norwegian's counsel would have been well advised to adhere to the following admonition: "Litigation should be a last resort, not the first option." Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 402 (1994) (Brown J., concurring). "Rational thought and wise counseling are available at far less expense[.]"*fn21 Ibid. And, I might add, much less professional embarrassment.

Opinion Footnotes

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[57] *fn1 Tara Casavant.

[58] *fn2 The Casavants' concerns were not idiosyncratic. Reverberations from the September 11 attack on cruise ship bookings were recognized in law articles concerning maritime law. See, e.g., Dickerson, The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights, 28 Tul. Mar. L.J. 447, 454-455 (2004) ("On September 11, 2001 four regularly scheduled domestic commercial aircraft were hijacked by terrorists. Two of the aircraft were flown into both towers of the World Trade Center in New York City resulting in their collapse. A third hijacked aircraft was flown into the Pentagon in Washington, D.C. A fourth aircraft crashed into a field near Pittsburgh. The total number of dead was nearly 3,000. The ease with which the hijackers boarded the aircraft and seized control with knives and box cutters highlighted just how vulnerable our airports and commercial aircraft are to terrorist acts. This horrific disaster has and will continue to generate significant changes in passenger security at airports and on aircraft and on other forms of mass transportation such as cruise ships"). See also id. at 455 n.56, quoting from McDowell, Security is Tightened on Ships and at Ports, N.Y. Times, Dec. 9, 2001, at 3 ("But since Sept. 11, security has been ramped up at ports and on cruise ships and other vessels to its highest level since World War II. The Coast Guard, which oversees maritime security, added uniformed armed 'sea marshals' to cruise ships in October and Coast Guard cutters equipped with machine guns often escort cruise and cargo ships to and from port").

[59] *fn3 The Norwegian counterclaim was based on a letter by Norwegian's lawyer, which stated the lawyer's position that the Casavants "had more than adequate opportunity to review its [the ticketing contract's] terms and conditions and to object to its contents." Predicated only on this letter expressing the corporate lawyer's post-commencement-of-litigation views -- to the favor of his client -- the counterclaim boldly asserted that, because of "the subject Passenger Ticket Contract, Plaintiffs vexatiously commenced litigation in the Commonwealth in direct violation of the Dade County, Florida forum selection clause in the Passenger Ticket Contract for which defendant [Norwegian] demands counsel fees, costs and disbursements as allowable by law in defense of this action."

[60] *fn4 The record reflects the following chronology concerning the Casavants' booking, payment, and receipt of the ticketing contract: In October, 2000, the Casavants booked a Boston to Bermuda round-trip cruise at a travel agency operating within the discount warehouse store, BJ's. The scheduled departure date was September 16, 2001. The total price for the two tickets was $2,145.50. At this initial booking in October, 2000, the Casavants paid a deposit of $628 and thereafter, tendered additional payments, so that, prior to July 18, 2001, the balance was paid in full. As noted above, Norwegian did not provide the Casavants information concerning the essential terms of the contract for passage, until the early September, 2001, submission of the ticketing documentation. (Norwegian admits it mailed the ticket on August 27, and that the Casavants received the document approximately one week later.)

[61] *fn5 In pertinent part, par. 1 of the ticketing contract stated as follows:
"All the terms and provisions of all sides of this Contract, including all of the following matter printed below, are a part of this Contract to which the passenger and/or purchaser, both on his/her behalf and on behalf of any other person or persons, including children, for whom this ticket is purchased, acknowledge and agree to be bound thereby by accepting this Contract or transportation from the Carrier."

[62] *fn6 Another contractual term limited Norwegian's liability for "terrorist actions or threats [and] hijacking" -- an active point in light of the Casavants' fear.
"The passenger admits a full understanding of the nature and character of the vessel and assumes all risks of travel, transportation and handling of passengers and baggage. The passenger assumes the risk of, and agrees that the Carrier and the vessel shall not be liable for (a) injury, death, or delay of or to the passenger; or (b) loss, damage or delay to the passenger's baggage, personal effects, or property arising from, caused by or in the judgment of the Carrier or Master rendered necessary or advisable by reason of any act of God or public enemies, arrest, restraints of princes, rulers of people, piracy, war, revolution, extortion, terrorist actions or threats, hijacking, bombing, threatened or actual rebellion, insurrection, civil strife, fire. . . ."

[63] *fn7 The forum selection clause in the ticketing contract document provides as follows:
"This Contract shall be governed in all respects by the laws of the State of Florida and the laws of the United States of America. It is hereby agreed that any and all claims, disputes or

controversies whatsoever arising from or in connection with this Contract and the transportation furnished hereunder shall be commenced, filed and litigated, if at all, before a court of proper jurisdiction located in Dade County, Florida, U.S.A."

[64] *fn8 As in this case, the rule 12(b)(6) motion may be converted to one for summary judgment under Mass.R.Civ.P. 56, 365 Mass. 824 (1974). See infra.

[65] *fn9 Norwegian's brief is misleading and disingenuous in its description of when the dismissal entered. The docket records the judge's ruling allowing the dismissal motion as having entered on December 9, 2002. However, the Norwegian appellate brief represents as follows:
"However, the Docket Entries record that the Casavants' opposition and objection to [Norwegian's] motion to dismiss were filed with the court below on December 10, 2002. . . . Two days later on December 12, 2002, after due deliberation on this modest claim, the lower court issued the Clerk's Notice stating that the motion to dismiss was allowed. . . . Judgment was entered the following day. . . . Therefore, the court below had adequate opportunity to consider the Casavants' substantive arguments before rejecting them."
The description set forth above is nothing more, nor less, than a misdirected effort designed to suggest to this court that the judge acted on the motion only after reviewing the Casavants' opposition. First, the clerk's notice (which serves as the form of mailing notice to counsel of court entries) cites "the Court's action on 12/09/2002," dismissing the action "for the reasons set forth in the defendant's memorandum." Second, in the unlikely event that counsel's eye missed this date in reviewing the clerk's notice, at the time of filing its appellate brief to this court, Norwegian's counsel full well could see the docket included in the record appendix, which confirms the December 9 entry date for the judge's dismissal. We need not say more about this kind of "advocacy."

[66] *fn10 It is provided in Mass.R.Civ.P. 12(b) that the opposing party shall be given the opportunity to respond if the dismissal motion rests on supplemental materials beyond the original complaint pleadings:
"If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" (emphasis added).

[67] *fn11 Seeking to bring to the Superior Court judge's attention that their opposition was not considered before entry of the dismissal, the Casavants filed for reconsideration or, in the alternative, relief from the judgment. See Mass.R.Civ.P. 60(b), 365 Mass. 828 (1974). For reasons not stated in the record, this motion was denied.

[68] *fn12 The Supreme Judicial Court's adoption of The Bremen doctrine concerning forum selection clauses was not limited to maritime contracts, the context in which The Bremen was decided. Rather, the court's analysis was broader and accepted the validity of forum selection clauses if fair and reasonable in all contexts. For example, the Jacobson case

forum selection clause appeared in a franchising agreement. 419 Mass. at 573.

[69] *fn13 The majority of the Court reasoned that such notice was conceded to have been provided in the circumstances presented in Carnival Cruise, and, hence, the majority found the forum selection clause enforceable. 499 U.S. at 595. Two dissenting justices were not so persuaded and had deeper concerns, writing that "only the most meticulous passenger is likely to become aware of the forum-selection provision," and that "[t]hese clauses are typically the product of disparate bargaining power between the carrier and the passenger," id. at 597 (Stevens, J., dissenting) -- a point as addressed above, which was shared by the majority in the Court's ultimate decision. Further, the dissenting opinion also concludes that, "[e]ven if passengers received prominent notice of the forum-selection clause before they committed the cost of the cruise, [the dissenting judges] would remain persuaded that the clause was unenforceable under traditional principles of federal admiralty law and is 'null and void' under the terms of Limitation of Vessel Owner's Liability Act, ch. 521, 49 Stat. 1480, 46 U.S.C. App. § 183c, which was enacted in 1936 to invalidate expressly stipulations limiting shipowners' liability for negligence." Id. at 598.

[70] *fn14 Although Federal maritime law controls, we note that the refinements crafted in Carnival Cruise comport with State law set forth in the Supreme Judicial Court's decision in Jacobson that a forum selection clause will be enforced only "if it is fair and reasonable to do so." Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. at 573.

[71] *fn15 The First Circuit has applied a two-prong test, Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 864-866 (1st Cir. 1983), to determine whether the forum selection clause was reasonably communicated to the passengers such that enforcement was fair. First, the ticket itself is examined for facial clarity; second, the circumstances attending the passenger's purchase, and opportunity to become familiar with the ticket and its terms, are considered. Cf. Lousararian v. Royal Caribbean Corp., 951 F.2d 7, 10-12 (1st Cir. 1991) (applying two-prong test to determine reasonableness of cruise line's effort to alert passengers to shorter limitations period in passenger ticket contract).

[72] *fn16 The Casavants argue that, because Federal maritime law is silent, Massachusetts law controls the question whether the ticketing contract was accepted, such that there was a binding agreement. This issue of contract formation differs from general intersticial construction of an indisputably binding contract. The Massachusetts connections with respect to choice of law in analyzing this contract formation issue are many: the Casavants are Massachusetts citizens, they purchased the cruise tickets in Massachusetts, the ship was to sail from and return to a Massachusetts port, the alleged reasons for the Casavants' cancellation arose from their concerns about terrorist activities originating from Massachusetts transportation facilities, and the Casavants filed suit in Massachusetts and sought to enforce, among other things, the Massachusetts consumer protection statute, G. L. c. 93A. See generally Bushkin Assocs. v. Raytheon Co., 393 Mass. 622, 632 (1985); Hodas v. Morin, 442 Mass. 544, 549 (2004). Norwegian did not dispute application of Massachusetts law, notwithstanding that the forum selection clause provided that the contract would be governed by Florida law. Cf. Muratore v. M/S Scotia Prince, 845 F.2d 347, 352 n.3 (1st Cir. 1988) (in suit brought in Maine District Court, and where forum

selection not at issue, Maine law applied to supplement maritime law where no objection from parties).

[73] *fn17 The cruise ship tort cases upon which Norwegian relies for per se enforcement of forum selection clauses are distinguishable. These cases, in the main, involve passengers who received their tickets prior to the scheduled cruise, and, notwithstanding reasonable opportunity to reject the contract, embarked on the cruise, thereby taking the contractual benefit. Restatement (Second) of Contracts § 69(1)(a). See generally McGurn v. Bell Microprods., Inc., 284 F.3d at 91 ("legal rule in Massachusetts [is] that silence in response to an offer may constitute an acceptance if an offeree who takes the benefit of offered services knew or had reason to know of the existence of the offer, and had a reasonable opportunity to reject it"). The Casavants did not avail themselves of the service offered.

[74] *fn18 The same result would obtain if we were to review the issue pursuant to Mass.R.Civ.P. 60(b). See note 11, supra; Pielech v. Massasoit Greyhound, Inc., 47 Mass. App. Ct. 322, 325 (1999), and cases cited.

[75] *fn19 In the affidavit, Kilgour states, inter alia, as follows:
"At all times relevant, it was, and remains, the policy of [Norwegian] to refund in full the fare paid by a passenger, without penalty, if that passenger wishes to cancel a cruise because of an objection to a provision contained in the Contract of Passage before the cruise in question begins."

[76] *fn20 "The modern version of the statute saves 'all other remedies to which [suitors] are otherwise entitled.' 28 U.S.C. § 1333. The upshot is that an injured party may have claims arising from a single accident both under federal maritime law and under state law, whether legislation or common law." Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 626 (1st Cir. 1994).

[77] *fn21 This is not a new concern, for one need only look to the timeless words of Chief Justice Stone, given in an address in 1934, exhorting members of the bar to honor their overarching duties as officers of the court in the course of their representation of business entities. Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1 (1934).

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MIGUEL **NUNEZ,** Appellant, v. **AMERICAN SEAFOODS,** Appellee.

Supreme Court No. S-9875, No. 5593

SUPREME COURT OF ALASKA

52 P.3d 720; 2002 Alas. LEXIS 98; 2002 AMC 1841

July 12, 2002, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Dillingham, Fred Torrisi, Judge. Superior Court No. 3DI-99-141 CI.

DISPOSITION: Reversed.

COUNSEL: Lanning M. Trueb, Beard Stacey Trueb Jacobsen & Stehle, LLP, Anchorage, for Appellant.

Michael A. Barcott and Stephen C. Smith, Holmes Weddle & Barcott, Seattle, Washington, for Appellee.

JUDGES: Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

OPINIONBY: BRYNER

OPINION: [*720] BRYNER, Justice.

I. INTRODUCTION

After injuring himself while working aboard the F/T OCEAN ROVER in Dutch Harbor, seaman Miguel Nunez sued his employer, American Seafoods, in the Alaska Superior Court at Dillingham. He appeals that court's order dismissing his case based on a contractual forum selection clause that required him to sue in United States District Court in Seattle, Washington. We reverse, [*721] holding that the employment contract's forum selection clause is invalid because it violates Nunez's right to sue under the Jones Act in any eligible forum.

II. [**2] FACTS AND PROCEEDINGS

Miguel Nunez was a seaman employed by American Seafoods on the fishing tender F/T OCEAN ROVER when he was injured in port at Dutch Harbor in 1999. Nunez was getting the gang way out when a deck rail of the OCEAN ROVER collapsed and Nunez fell twenty feet to the dock below. The fall severely injured Nunez.

Jones Act American Seafoods had employed Nunez on various fishing vessels beginning in 1996. Nunez signed a fishing agreement with American Seafoods for his work on the OCEAN ROVER on July 20, 1999. The agreement included a forum selection clause specifying that "any legal action ...involving this contract or any incident or injury occurring aboard the Vessel ...may be brought only in the Federal District Court for the Western District of Washington at Seattle."

Nunez nonetheless filed suit against American Seafoods in superior court at Dillingham, alleging admiralty jurisdiction under the federal saving to suitors clause **n1** and the Jones Act. **n2** American Seafoods moved to dismiss based on the forum selection clause. Superior Court Judge Fred Torrisi heard oral arguments in Dillingham, upheld the forum clause, and granted American Seafoods' motion to [**3] dismiss "without prejudice to refile in the U.S. District Court in Seattle." Nunez appeals.

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n1 28 U.S.C. § 1333 (1988).

n2 46 U.S.C. App. § 688 (1988).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

III. ANALYSIS

A. Standard of Review

This court reviews a grant of a motion to dismiss de novo. **n3** "Whether [a] forum-selection clause is enforceable is a question of law" to which we apply our independent judgment. **n4** We also review de novo whether a fishing agreement complies with relevant federal admiralty law. **n5**

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 *Hutton v. Realty Executives, Inc.*, 14 P. 3d 977, 979 (Alaska 2000).

n4 *Bodzai v. Arctic Fjord, Inc.*, 990 P.2d 616, 618 (Alaska 1999).

n5 *Bjornsson v. U.S. Dominator, Inc.*, 863 P.2d 235, 237 (Alaska 1993).

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B. [**4] **Discussion**

Nunez argues that the forum selection clause is void because it violates federal law. He argues that the Jones Act expressly incorporates the provisions of the Federal Employer's Liability Act (FELA) and that in *Boyd v. Grand Trunk Western Railroad Co.*, **n6** the United States Supreme Court expressly interpreted section 5 of the FELA to declare void any contract provision within the Act's coverage that limits an employee's "right to bring suit in any eligible forum." **n7** American Seafoods, citing *Carnival Cruise Lines, Inc. v. Shute* **n8** and *M/S*

BREMEN v. Zapata Off-Shore Co., **n9** counters that the Supreme Court has more recently declared maritime forum selection clauses to be presumptively valid; according to American Seafoods, Nunez has failed to overcome this presumption. **n10**

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n6 338 U.S. 263 (1949).

n7 *Id.* at 265.

n8 499 U.S. 585, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991).

n9 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972).

n10 In dismissing Nunez's complaint, the superior court accepted American Seafoods' position.

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We find Nunez's arguments to be more persuasive. *Carnival Cruise Lines* and *M/S BREMEN* undeniably recognize that a strong presumption of validity attaches to forum selection clauses under general maritime law. **n11** But Nunez filed his complaint under the saving to suitors clause and the Jones Act, not under general maritime law.

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n11 *Carnival Cruise Lines*, 499 U.S. at 593-94; *M/S BREMEN*, 407 U.S. at 10.

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As we have noted in previous cases, [*722] the "saving to suitors" clause **n12** generally "means that a suitor asserting an *in personam* admiralty claim may elect to sue in a 'common law' state court through an ordinary civil action. In such actions, the state courts must apply the same substantive law as would be applied had the

suit been instituted in admiralty in a federal court." **n13**

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n12 The saving to suitors clause is contained within 28 U.S.C. § 1333, which states, in relevant part: The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

[**6]

n13 *Brown v. State*, 816 P.2d 1368, 1370 (Alaska 1991) (quoting *Shannon v. City of Anchorage*, 478 P.2d 815, 818 (Alaska 1970)) (footnotes omitted).

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In the present case, the Jones Act prescribes the substantive maritime law by providing a right of action allowing injured sailors to sue their employers for negligence. **n14** The substantive rights conferred by the Jones Act are not the same as those conferred by general maritime law: in enacting the Jones Act, Congress "intended to change the maritime law as stated in *The Osceola* under which an injured seaman could recover more than his maintenance and cure only in an action based on unseaworthiness and could not recover damages for negligence of master or crew in the navigation or management of the ship." **n15** Hence, "the substantive rules of maritime law, as modified by the Jones Act, apply[.]" **n16**

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n14 *Brown*, 816 P.2d at 1372 (citing 46 U.S.C. App. § 688(a) (1988)).

[**7]

n15 GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 325 (2d ed. 1975) (footnote omitted) (citing, among other cases, *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483 (1903)).

n16 *Brown*, 816 P.2d at 1371 (citing *Shannon*, 478 P.2d at 818).

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The Jones Act accomplishes its goal of giving injured seamen a right of action against their employers by

incorporating the rights conferred to railway workers under the FELA; **n17** in relevant part, the Jones Act provides:

Any seaman who shall suffer personal injury in the course of his employment may ...maintain an action for damages at law ...and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway workers shall apply ... . **n18** As we recognized in *Brown v. State*, The [Jones Act's] language concerning the rights and remedies of railway employees has the effect of extending to sailors the provisions of the [FELA]. Most importantly, sailors have the right to sue shipowners [**8] for damages for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [shipowner], or by reason of any defect or insufficiency, due to its negligence, in its ...equipment." **n19** The Jones Act thus effectively places an injured seaman like Nunez in the

shoes of an injured FELA railway worker:

[The Jones Act] expressly provides for seamen the cause of action - and consequently the *entire judicially developed doctrine of liability* - granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers [in a line of cases allowing recovery without a showing of negligence] and the principles governing those cases clearly should apply here. **n20** And as we further recognized in *Brown*, the Supreme Court's interpretation of section

5 of the FELA in *Boyd v. Grand Trunk Western* strictly curtails an employer's right to contractually limit a worker's substantive rights:

Section 5 of FELA closely limits the ability of an employer to restrict its own liability: "Any contract, rule, regulation, or device whatsoever, [**9] the purpose or intent of [*723] which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. ..." The Supreme Court has found that "Congress wanted § 5 to have the full effect that its comprehensive phraseology implies." **n21** The specific issue considered in *Boyd* was the validity of a contractual

forum selection agreement limiting an injured railroad worker's choice of forum under the FELA. **n22** Section 6 of the FELA gives injured railway workers the choice of filing their claims in a state or federal forum. **n23** Relying on section 5's categorical prohibition of contracts exempting employers from FELA liability, **n24** *Boyd* invalidated the disputed forum selection agreement, holding that a worker's "right [under section 6] to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5" and so could not be restricted by a contractual provision. **n25**

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n17 45 U.S.C. §§ 51-60 (1988).

n18 46 U.S.C. App. § 688(a).

[**10]

n19 *Brown*, 816 P.2d at 1372 (internal citations omitted) (quoting 45 U.S.C. § 51 (1988)).

n20 *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439, 2 L. Ed. 2d 382, 78 S. Ct. 394 (1958) (emphasis added).

n21 *Brown*, 816 P.2d at 1373 (quoting, respectively, 45 U.S.C. § 55 (1988) and *Boyd v. Grand Trunk W.R.R. Co.*, 338 U.S. 263, 265, 94 L. Ed. 55, 70 S. Ct. 26 (1949)).

n22 *Boyd*, 338 U.S. at 263.

n23 *Id.* at 265; 45 U.S.C. § 56.

n24 45 U.S.C. § 55.

n25 *Boyd*, 338 U.S. at 265.

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Here, the saving to suitors clause gives Nunez a comparable right to select a state or federal forum. Because Nunez stands "in a position perfectly analogous to that of [a railroad worker under the FELA]," **n26** the scope of this right to file suit in his forum of choice must be gauged under section 5, just as in *Boyd*. And *Boyd* dictates the conclusion that section 5 of the [**11] FELA requires that Nunez's right to bring suit in "any eligible forum" be deemed substantive and that any contractual provision purporting to limit it be deemed void.

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n26 *Kernan*, 355 U.S. at 439.

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Contrary to American Seafoods' position, nothing in *Carnival* or *M/S BREMEN* undermines *Boyd*. As already indicated, *Carnival* and *M/S BREMEN* establish the presumptive validity of forum selection clauses under general maritime law, whereas Nunez brings his action under maritime law as modified by the Jones Act, which

incorporates FELA. Indeed, *M/S BREMEN* approvingly cites *Boyd* when discussing an important caveat to its rule favoring enforcement of forum selection clauses: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. *See, e. g.*, [Boyd]." **n27** If anything, then, *M/S BREMEN* reconfirms the vitality [**12] of *Boyd's* declaration that section 5 of the FELA renders forum selection clauses unenforceable.

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n27 407 U.S. at 15. This passage from *M/S BREMEN* was also quoted approvingly by this court in *Volkswagenwerk, A.G. v. Klippan, GmbH*, 611 P.2d 498, 504 (Alaska 1980).

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Nor does American Seafoods cite any other persuasive authority or reason to establish that *Boyd* does not apply to a Jones Act claim. **n28** American Seafoods relies heavily on *Marinechance Shipping, Ltd. v. Sebastian* **n29** and its progeny to fortify its position. **n30** But these cases are inapposite, for they involve foreign sailors who were employed by foreign shippers, served on foreign flagged vessels, and were employed under contracts that called for resolution of their legal disputes in other nations; thus, these cases address problems of uniformity and comity that are unique to their international settings and do not purport to apply - or even to meaningfully consider - the Jones Act or [**13] the continued [*724] vitality of *Boyd*. Here, by contrast, the facts of Nunez's case lack any significant international dimension, and the Jones Act's incorporation of the FELA squarely controls the case's outcome. **n31**

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n28 American Seafoods does attempt to distinguish *Boyd* on its facts by noting that it involved a post-injury forum selection contract. But nothing in *Boyd* indicates that the Court gave any weight to the timing of the contractual provision. And in any event, our case law suggests that a pre-injury contractual compromise of Jones Act rights should be deemed presumptively more questionable, not less questionable, than a post-injury compromise. *See Brown*, 816 P.2d at 1376.

n29 143 F.3d 216 (5th Cir. 1998).

n30 *See, e. g., Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998); *Sabocuhan v. Geco-Prakla*, 78 F. Supp. 2d 603 (S. D. Texas 1999); *Valle v. Chios Venture Shipping*, 1999 U.S. Dist. LEXIS 3435, 1999 WL 155942 (E. D. La., March 17, 1999); *Lejano v. KS Bandak*, 705 S. 2d 158 (La. 1997).

[**14]

n31 American Seafoods also relies on the United States District Court's decision in *Willard v. The Fishing Company of Alaska*, 1995 A.M.C. 1358 (D. Alaska). But *Willard*, too, is inapposite. There, several injured Jones Act seamen employed by a Seattle based company filed suit in the United States District Court in Anchorage; their employer relied on contractual choice-of-forum clauses to transfer venue to federal court in Washington. Because the seamen opted to bring their suits in a federal forum rather than in a state forum, the district court in *Willard* correctly recognized that the cases presented a question of change of venue rather than a change of forum and were therefore governed by the Jones Act's internal venue provisions - as opposed to the forum provision of the saving to suitors clause. *Id.* at 1359-60. As the district court also correctly observed in *Willard*, the Supreme Court has construed the Jones Act's venue clause to have no substantive significance. *Id.* at 1360. Moreover, because under the facts of *Willard* the Jones Act's venue clause would have required the plaintiffs in that case to file their action in Washington - the employer's residence - rather than Alaska, *see* 46 U.S.C. App. § 688(a), the plaintiff's election to file in a federal forum in Alaska could not have been deemed to be the selection of an "eligible forum" under *Boyd.*

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**15]

The superior court's decision to enforce Nunez's forum selection clause in the present case rested largely on the court's perception that our recent decision in *Bodzai v. Fjord*, **n32** tacitly found *Boyd* inapplicable to Jones Act cases by failing to mention that decision. But *Bodzai's* silence on the point does not support this conclusion. **n33**

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n32 990 P.2d 616 (Alaska 1999).

n33 In *Bodzai* we considered the validity of a forum selection clause that required Bodzai, an injured seaman, to file any claims arising "under the terms" of his employment contract in Washington. Bodzai asserted three separate admiralty claims in state court, only one of which was a Jones Act claim. *Id.* at 617. As an argument common to all three claims, Bodzai asserted that none arose "under the terms" of his employment contract and, consequently, none was barred by the forum selection clause. *Id.* at 618. In contrast, although Bodzai alternatively argued that the forum selection clause was barred by *Boyd's* prohibition against contractual limitations of liability, that argument only applied to his Jones Act claim. In deciding *Bodzai*, we addressed and resolved all three claims on their common issue, holding that none of the claims arose under the terms of Bodzai's contract. Resolving the entire case on that basis left us no occasion to reach Bodzai's alternative theory for disposing of the Jones Act claim - that the forum selection was precluded by *Boyd.* In that context, then, our silence concerning Bodzai's alternative theory signaled no hidden view as to its merits.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**16]

In *Brown v. State*, we recognized the continuing vitality of *Boyd* in the Jones Act context and held that "section 5 of FELA closely limits the ability of an employer to restrict its own [Jones Act] liability[.]" **n34** Nothing presented by American Seafoods has persuaded us to alter this decision.

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n34 816 P.2d 1368, 1373 (Alaska 1991).

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IV. CONCLUSION

The superior court's order of dismissal is REVERSED.

Nunez v. American Seafoods, No. S-9875 (Alaska 07/12/2002)

[1] THE SUPREME COURT OF THE STATE OF ALASKA

[2] Supreme Court No. S-9875

[3] 2002.AK.0000204 <http://www.versuslaw.com>

[4] July 12, 2002

[5] **MIGUEL NUNEZ, APPELLANT,**
v.
AMERICAN SEAFOODS, APPELLEE.

[6] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Dillingham, Fred Torrisi, Judge. Superior Court No. 3DI-99-141 CI

[7] Appearances: Lanning M. Trueb, Beard Stacey Trueb Jacobsen & Stehle, Llp, Anchorage, for Appellant.

[8] Michael A. Barcott and Stephen C. Smith, Holmes Weddle & Barcott, Seattle, Washington, for Appellee.

[9] Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

[10] The opinion of the court was delivered by: Bryner, Justice

[11] OPINION

[12] No. 5593

[13] I. INTRODUCTION

[14] After injuring himself while working aboard the F/T Ocean Rover in Dutch Harbor, seaman Miguel Nunez sued his employer, American Seafoods, in the Alaska Superior Court at Dillingham. He appeals that court's order dismissing his case based on a contractual forum selection clause that required him to sue in United States District Court in Seattle,

Washington. We reverse, holding that the employment contract's forum selection clause is invalid because it violates Nunez's right to sue under the Jones Act in any eligible forum.

[15] II. FACTS AND PROCEEDINGS

[16] Miguel Nunez was a seaman employed by American Seafoods on the fishing tender F/T Ocean Rover when he was injured in port at Dutch Harbor in 1999. Nunez was getting the gang way out when a deck rail of the Ocean Rover collapsed and Nunez fell twenty feet to the dock below. The fall severely injured Nunez.

[17] American Seafoods had employed Nunez on various fishing vessels beginning in 1996. Nunez signed a fishing agreement with American Seafoods for his work on the Ocean Rover on July 20, 1999. The agreement included a forum selection clause specifying that "any legal action . . . involving this contract or any incident or injury occurring aboard the Vessel . . . may be brought only in the Federal District Court for the Western District of Washington at Seattle."

[18] Nunez nonetheless filed suit against American Seafoods in superior court at Dillingham, alleging admiralty jurisdiction under the federal saving to suitors clause *fn1 and the Jones Act. *fn2 American Seafoods moved to dismiss based on the forum selection clause. Superior Court Judge Fred Torrisi heard oral arguments in Dillingham, upheld the forum clause, and granted American Seafoods' motion to dismiss "without prejudice to refile in the U.S. District Court in Seattle." Nunez appeals.

[19] III. ANALYSIS

[20] A. Standard of Review

[21] This court reviews a grant of a motion to dismiss de novo. *fn3 "Whether [a] forum-selection clause is enforceable is a question of law" to which we apply our independent judgment. *fn4 We also review de novo whether a fishing agreement complies with relevant federal admiralty law. *fn5

[22] B. Discussion

[23] Nunez argues that the forum selection clause is void because it violates federal law. He argues that the Jones Act expressly incorporates the provisions of the Federal Employer's Liability Act (FELA) and that in Boyd v. Grand Trunk Western Railroad Co., *fn6 the United States Supreme Court expressly interpreted section 5 of the FELA to declare void any contract provision within the Act's coverage that limits an employee's "right to bring suit in any eligible forum." *fn7 American Seafoods, citing Carnival Cruise Lines, Inc. v.

Shute *fn8 and M/S Bremen v. Zapata Off-Shore Co., *fn9 counters that the Supreme Court has more recently declared maritime forum selection clauses to be presumptively valid; according to American Seafoods, Nunez has failed to overcome this presumption. *fn10

[24] We find Nunez's arguments to be more persuasive. Carnival Cruise Lines and M/S Bremen undeniably recognize that a strong presumption of validity attaches to forum selection clauses under general maritime law. *fn11 But Nunez filed his complaint under the saving to suitors clause and the Jones Act, not under general maritime law. As we have noted in previous cases, the "saving to suitors" clause *fn12 generally "means that a suitor asserting an in personam admiralty claim may elect to sue in a 'common law' state court through an ordinary civil action. In such actions, the state courts must apply the same substantive law as would be applied had the suit been instituted in admiralty in a federal court." *fn13

[25] In the present case, the Jones Act prescribes the substantive maritime law by providing a right of action allowing injured sailors to sue their employers for negligence. *fn14 The substantive rights conferred by the Jones Act are not the same as those conferred by general maritime law: in enacting the Jones Act, Congress "intended to change the maritime law as stated in The Osceola under which an injured seaman could recover more than his maintenance and cure only in an action based on unseaworthiness and could not recover damages for negligence of master or crew in the navigation or management of the ship." *fn15 Hence, "[t]he substantive rules of maritime law, as modified by the Jones Act, apply [.]" *fn16

[26] The Jones Act accomplishes its goal of giving injured seamen a right of action against their employers by incorporating the rights conferred to railway workers under the FELA; *fn17 in relevant part, the Jones Act provides:

[27] Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway workers shall apply *fn18

[28] As we recognized in Brown v. State,

[29] The [Jones Act's] language concerning the rights and remedies of railway employees has the effect of extending to sailors the provisions of the [FELA]. Most importantly, sailors have the right to sue shipowners for damages for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such [shipowner], or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment." *fn19

[30] The Jones Act thus effectively places an injured seaman like Nunez in the shoes of an injured FELA railway worker:

[31] [The Jones Act] expressly provides for seamen the cause of action - and consequently the entire judicially developed doctrine of liability - granted to railroad workers by the FELA. The deceased seaman here was in a position perfectly analogous to that of the railroad workers [in a line of cases allowing recovery without a showing of negligence] and the principles governing those cases clearly should apply here. *fn20

[32] And as we further recognized in Brown, the Supreme Court's interpretation of section 5 of the FELA in Boyd v. Grand Trunk Western strictly curtails an employer's right to contractually limit a worker's substantive rights:

[33] Section 5 of FELA closely limits the ability of an employer to restrict its own liability: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . ." The Supreme Court has found that "Congress wanted § 5 to have the full effect that its comprehensive phraseology implies." *fn21

[34] The specific issue considered in Boyd was the validity of a contractual forum selection agreement limiting an injured railroad worker's choice of forum under the FELA. *fn22 Section 6 of the FELA gives injured railway workers the choice of filing their claims in a state or federal forum. *fn23 Relying on section 5's categorical prohibition of contracts exempting employers from FELA liability, *fn24 Boyd invalidated the disputed forum selection agreement, holding that a worker's "right [under section 6] to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate of § 5" and so could not be restricted by a contractual provision. *fn25

[35] Here, the saving to suitors clause gives Nunez a comparable right to select a state or federal forum. Because Nunez stands "in a position perfectly analogous to that of [a railroad worker under the FELA]," *fn26 the scope of this right to file suit in his forum of choice must be gauged under section 5, just as in Boyd. And Boyd dictates the conclusion that section 5 of the FELA requires that Nunez's right to bring suit in "any eligible forum" be deemed substantive and that any contractual provision purporting to limit it be deemed void.

[36] Contrary to American Seafoods' position, nothing in Carnival or M/S Bremen undermines Boyd. As already indicated, Carnival and M/S Bremen establish the presumptive validity of forum selection clauses under general maritime law, whereas Nunez brings his action under maritime law as modified by the Jones Act, which incorporates FELA. Indeed, M/S Bremen approvingly cites Boyd when discussing an important caveat to its rule favoring enforcement of forum selection clauses: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. See, e.g., [Boyd]." *fn27 If anything, then, M/S Bremen reconfirms the vitality of Boyd's declaration that section 5 of the FELA renders forum selection clauses unenforceable.

[37] Nor does American Seafoods cite any other persuasive authority or reason to establish that

Boyd does not apply to a Jones Act claim. *fn28 American Seafoods relies heavily on Marinechance Shipping, Ltd. v. Sebastian *fn29 and its progeny to fortify its position. *fn30 But these cases are inapposite, for they involve foreign sailors who were employed by foreign shippers, served on foreign flagged vessels, and were employed under contracts that called for resolution of their legal disputes in other nations; thus, these cases address problems of uniformity and comity that are unique to their international settings and do not purport to apply - or even to meaningfully consider - the Jones Act or the continued vitality of Boyd. Here, by contrast, the facts of Nunez's case lack any significant international dimension, and the Jones Act's incorporation of the FELA squarely controls the case's outcome. *fn31

[38] The superior court's decision to enforce Nunez's forum selection clause in the present case rested largely on the court's perception that our recent decision in Bodzai v. Fjord, *fn32 tacitly found Boyd inapplicable to Jones Act cases by failing to mention that decision. But Bodzai's silence on the point does not support this conclusion. *fn33

[39] In Brown v. State, we recognized the continuing vitality of Boyd in the Jones Act context and held that "[s]ection 5 of FELA closely limits the ability of an employer to restrict its own [Jones Act] liability[.]" *fn34 Nothing presented by American Seafoods has persuaded us to alter this decision.

[40] IV. CONCLUSION

[41] The superior court's order of dismissal is REVERSED.

Opinion Footnotes

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[42] *fn1 28 U.S.C. § 1333 (1988).

[43] *fn2 46 U.S.C. App. § 688 (1988).

[44] *fn3 Hutton v. Realty Executives, Inc., 14 P.3d 977, 979 (Alaska 2000).

[45] *fn4 Bodzai v. Arctic Fjord, Inc., 990 P.2d 616, 618 (Alaska 1999).

[46] *fn5 Bjornsson v. U.S. Dominator, Inc., 863 P.2d 235, 237 (Alaska 1993).

[47] *fn6 338 U.S. 263 (1949).

[48] *fn7 Id. at 265.

[49] *fn8 499 U.S. 585 (1991).

[50] *fn9 407 U.S. 1 (1972).

[51] *fn10 In dismissing Nunez's complaint, the superior court accepted American Seafoods' position.

[52] *fn11 Carnival Cruise Lines, 499 U.S. at 593-94; M/S Bremen, 407 U.S. at 10.

[53] *fn12 The saving to suitors clause is contained within 28 U.S.C. § 1333, which states, in relevant part: The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

[54] *fn13 Brown v. State, 816 P.2d 1368, 1370 (Alaska 1991) (quoting Shannon v. City of Anchorage, 478 P.2d 815, 818 (Alaska 1970)) (footnotes omitted).

[55] *fn14 Brown, 816 P.2d at 1372 (citing 46 U.S.C. App. § 688(a) (1988)).

[56] *fn15 Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 325 (2d ed. 1975) (footnote omitted) (citing, among other cases, The Osceola, 189 U.S. 158 (1903)).

[57] *fn16 Brown, 816 P.2d at 1371 (citing Shannon, 478 P.2d at 818).

[58] *fn17 45 U.S.C. §§ 51-60 (1988).

[59] *fn18 46 U.S.C. App. § 688(a).

[60] *fn19 Brown, 816 P.2d at 1372 (internal citations omitted) (quoting 45 U.S.C. § 51 (1988)).

[61] *fn20 Kernan v. Am. Dredging Co., 355 U.S. 426, 439 (1958) (emphasis added).

[62] *fn21 Brown, 816 P.2d at 1373 (quoting, respectively, 45 U.S.C. § 55 (1988) and Boyd v. Grand Trunk W. R.R. Co., 338 U.S. 263, 265 (1949)).

[63] *fn22 Boyd, 338 U.S. at 263.

[64] *fn23 Id. at 265; 45 U.S.C. § 56.

[65] *fn24 45 U.S.C. § 55.

[66] *fn25 Boyd, 338 U.S. at 265.

[67] *fn26 Kernan, 355 U.S. at 439.

[68] *fn27 407 U.S. at 15. This passage from M/S Bremen was also quoted approvingly by this court in Volkswagenwerk, A.G. v. Klippen, GmbH, 611 P.2d 498, 504 (Alaska 1980).

[69] *fn28 American Seafoods does attempt to distinguish Boyd on its facts by noting that it involved a post-injury forum selection contract. But nothing in Boyd indicates that the Court gave any weight to the timing of the contractual provision. And in any event, our case law suggests that a pre-injury contractual compromise of Jones Act rights should be deemed presumptively more questionable, not less questionable, than a post-injury compromise. See Brown, 816 P.2d at 1376.

[70] *fn29 143 F.3d 216 (5th Cir. 1998).

[71] *fn30 See, e.g., Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998); Sabocuhan v. Geco- Prakla, 78 F. Supp. 2d 603 (S.D. Texas 1999); Valle v. Chios Venture Shipping, 1999 WL 155942 (E.D. La., March 17, 1999); Lajano v. KS Bandak, 705 S.2d 158 (La. 1997).

[72] *fn31 American Seafoods also relies on the United States District Court's decision in Willard v. The Fishing Company of Alaska, 1995 A.M.C. 1358 (D. Alaska). But Willard, too, is inapposite. There, several injured Jones Act seamen employed by a Seattle based company filed suit in the United States District Court in Anchorage; their employer relied on contractual choice-of-forum clauses to transfer venue to federal court in Washington. Because the seamen opted to bring their suits in a federal forum rather than in a state forum, the district court in Willard correctly recognized that the cases presented a question of change of venue rather than a change of forum and were therefore governed by the Jones Act's internal venue provisions - as opposed to the forum provision of the saving to suitors clause. Id. at 1359-60. As the district court also correctly observed in Willard, the Supreme

Court has construed the Jones Act's venue clause to have no substantive significance. Id. at 1360. Moreover, because under the facts of Willard the Jones Act's venue clause would have required the plaintiffs in that case to file their action in Washington - the employer's residence - rather than Alaska, see 46 U.S.C. App. § 688(a), the plaintiff's election to file in a federal forum in Alaska could not have been deemed to be the selection of an "eligible forum" under Boyd.

[73] *fn32 990 P.2d 616 (Alaska 1999).

[74] *fn33 In Bodzai we considered the validity of a forum selection clause that required Bodzai, an injured seaman, to file any claims arising "under the terms" of his employment contract in Washington. Bodzai asserted three separate admiralty claims in state court, only one of which was a Jones Act claim. Id. at 617. As an argument common to all three claims, Bodzai asserted that none arose "under the terms" of his employment contract and, consequently, none was barred by the forum selection clause. Id. at 618. In contrast, although Bodzai alternatively argued that the forum selection clause was barred by Boyd's prohibition against contractual limitations of liability, that argument only applied to his Jones Act claim. In deciding Bodzai, we addressed and resolved all three claims on their common issue, holding that none of the claims arose under the terms of Bodzai's contract. Resolving the entire case on that basis left us no occasion to reach Bodzai's alternative theory for disposing of the Jones Act claim - that the forum selection was precluded by Boyd. In that context, then, our silence concerning Bodzai's alternative theory signaled no hidden view as to its merits.

[75] *fn34 816 P.2d 1368, 1373 (Alaska 1991).

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DONNA ALYSON LITTLE, individually, and as guardian ad litem for BECKA ANNA ROSE PADGETT, a minor; BECKA ANNA ROSE PADGETT; ESTATE OF ROBERT PADGETT, by his personal representative DONNA ALYSON LITTLE, Plaintiffs, v. RMC PACIFIC MATERIALS, INC., CB ENGINEERING INC., Does 1 to 500, Defendants.

No. C 05-01936 MJJ

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 14338

July 11, 2005, Decided
July 11, 2005, Filed

COUNSEL: [*1] For Donna Alyson Little, individually, and as guardian ad litem, for Becka Anna Rose Padgett, a minor, Becka Anna Rose Padgett, Estate of Robert Padgett, by his personal representative Donna, Alyson Little, Plaintiffs: Philip R. Weltin, Brian Elmar Kerss, Weltin Law Office, P.C., Oakland, CA.

For RMC Pacific Materials Inc, Defendant: Patrick E. Taylor, Jr., Michael T. Kennedy, Taylor & Gutierrez, LLP, San Francisco, CA.

For TCB Industrial, Inc., Defendant: John Graves, Walnut Creek, CA.

JUDGES: MARTIN J. JENKINS, UNITED STATES DISTRICT JUDGE.

OPINIONBY: MARTIN J. JENKINS

OPINION:

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND DENYING DEFENDANT'S MOTION TO STRIKE

INTRODUCTION

Before the Court are Plaintiff's motion to remand this case to the Superior Court of the State of California and Plaintiff's request for an award of attorney's fees associated with the motion. Also before the Court is Defendant's motion to strike portions of Plaintiff's Complaint and an order for a more definite statement. For the following reasons, the Court **GRANTS** Plaintiff's motion to remand, **DENIES** Plaintiff's request for attorney's fees, and **DENIES** Defendant's motion to strike. [*2]

FACTUAL BACKGROUND

On January 26, 2005, longshoreman Robert Padgett (Plaintiff Donna Little's late husband) fell from a gangway, landed on the deck of a ship docked in Redwood City, California, and shortly thereafter died of his injuries. Plaintiff Donna Little, on behalf of herself, her daughter, and Mr. Padgett's estate, filed the instant lawsuit in state court alleging causes of action for wrongful death caused by negligence, wrongful death due to defective product, and a survival action for damages sustained by Padgett after the fall but prior to his death. The Complaint further alleges that the action is brought under general maritime law and "under all other applicable State and Federal statutes and laws." (Complaint at P 5.) On May 10, 2005, Defendant RMC Pacific, joined by Defendant TCB Industrial, timely removed the case to federal court alleging admiralty jurisdiction under *28 U.S.C. § 1333(1)*. (Notice of Removal at P 3.) Plaintiff timely filed the instant motion to remand on June 3, 2005. Defendant TCB Industrial joined in Plaintiff's motion to remand. Defendant RMC Pacific opposes the motion. n1

n1 While unanimity of defendants is required in order to effect removal, once the procedure for removal has been met, the only basis for remand is lack of subject matter jurisdiction.

[*3]

LEGAL STANDARD

A defendant may remove from state to federal court any civil action over which the district court would have had original jurisdiction. *28 U.S.C. § 1441(a)*. Federal

district courts have original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled," *28 U.S.C. § 1333(1)*, or "all civil actions arising under the Constitution, laws, or treaties of the United States," *28 U.S.C. § 1331*. A motion to remand is the proper procedure for challenging removal, and will succeed only upon a showing that the federal court lacks subject matter jurisdiction. While permitting removal in appropriate cases, the removal statute is strictly construed against removal jurisdiction. *Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988)*; *see also Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-109, 85 L. Ed. 1214, 61 S. Ct. 868 (1941)*. The strong presumption against removal jurisdiction means that the defendant has the burden of establishing that removal was proper. *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)*. [*4] Thus, remand should be granted if there is any doubt as to the right of removal in the first instance. *Id.*

ANALYSIS

I. Removal

In order to determine whether remand is proper, the Court must determine if it has subject matter jurisdiction. The Court must first assess whether removal of a state action based on maritime jurisdiction is proper. If not, the Court looks to see if an alternative basis for subject matter jurisdiction exists.

A. Removal of State Action Based on Maritime Jurisdiction Is Improper.

Defendant argues that removal based on *§ 1333(1)* was proper. The jurisdictional statute states: "[a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" *28 U.S.C. § 1333(1)* (emphasis added). Courts have consistently held that the "saving to suitors" clause prohibits a defendant from removing a case that has been brought in state court absent an alternative jurisdictional basis such as diversity. *Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 371, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)*; *see also Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1069 (9th Cir. 2000)*. [*5] Additionally, the Supreme Court has made it clear that "state courts [are] competent' to adjudicate maritime causes of action in proceedings in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." *Madruga v. Sup. Ct. of Cal., 346 U.S. 556, 560-61, 98 L. Ed. 290, 74 S. Ct. 298 (1954)*. Moreover, a purely maritime claim cannot be removed by a defendant alleging that application of federal maritime invokes federal question jurisdiction under *§ 1331. Romero, 358 U.S. at 379-80*; *Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 148 L. Ed. 2d 931, 121 S. Ct. 993 (2001)* ("to define admiralty jurisdiction as federal question jurisdiction would be a destructive oversimplification of the highly intricate interplay of the States and the National Government. . . .'")

Here, Defendant claims that Plaintiff's failure to specifically allege the "saving to suitors" clause in her Complaint makes removal proper. Yet, a plaintiff "is not required to state the statutory or constitutional basis for his claim, only the facts underlying it." *McHenry v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996)* (quoting *McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1224 (9th Cir. 1990))*. [*6] Defendant's very argument was rejected in *Triton Container International Ltd. v. Institute of London Underwriters, 1998 U.S. Dist. LEXIS 4296, 1998 WL 750941, at *4 (N.D. Cal. Apr. 1, 1998)*. The court in *Triton* deemed "meritless" the argument that "because plaintiff did not expressly stylize its state court complaint as one based on the saving to suitors' clause . . . removal is therefore proper."

Defendant further contends that because concurrent jurisdiction exists, the Complaint "could have been properly be [sic] brought in federal court in the first place." (Opposition at 3-4.) This argument is specious. Under the *Romero* line of cases, the "saving to suitors" clause *allows* Plaintiff to file in federal court should she choose to do so. *See, e.g., Morris, 236 F.3d at 1069*. However, Plaintiff has the option of filing in state court. *Id.* Accordingly, removal is not appropriate unless an alternative basis of subject matter jurisdiction exists. *Id.*

B. No Alternative Basis of Subject Matter Jurisdiction Exists.

Defendant claims that even if "general maritime" law does not grant subject matter jurisdiction under *§ 1333(1)*, Plaintiff's complaint implicates [*7] federal question jurisdiction under *§ 1331* because it invokes "[f]ederal statutes and laws." (Opposition at 5.) Federal question jurisdiction is implicated when the case "arises under" federal law. *See 28 U.S.C. § 1331*. A case "arises under" federal law where federal law either creates the cause of action or "the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8-9, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983)* (citations omitted). "[T]he presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank, 522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998)* (quoting *Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987))* (internal quotation marks

omitted). The federal element must be basic and not simply collateral, necessary and not merely possible, pivotal or substantial as opposed to incidental, and direct and essential not attenuated. *Hunter v. United Van Lines, 746 F.2d 635, 646 (9th Cir. 1984).* [*8]

In the instant case, Plaintiff's non-factual allegation that the action is "brought under all other applicable State and Federal statutes and laws" is insufficient to meet the standards of the "well-pleaded complaint rule." The factual allegations establish only a wrongful death action based on state law and general maritime law. None of the allegations establish a tort where the vindication of a right under state law would turn on some construction of federal law. The federal elements of the alleged torts are not basic to the resolution of the matter; they are simply collateral. Resolution of any federal issues is not necessary or pivotal to reaching the wrongful death and survival claims brought by Plaintiff. Accordingly, the Court finds that no alternate basis for subject matter jurisdiction under *§ 1331* exists and **GRANTS** Plaintiff's motion for remand.

II. Attorney's Fees

28 U.S.C. § 1447(c) provides that "[a]n order remanding the case *may* require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." (emphasis added). The Fifth Circuit has held that an award of attorney's [*9] fees is not appropriate if "the defendant had objectively reasonable grounds to believe the removal was legally proper." *Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290, 292 (5th Cir. 2000).*

Defendant could have objectively believed that removal was proper on the grounds that Plaintiff alleged both "maritime law" and "all other applicable State and Federal statutes and laws." Moreover, due to the concurrent subject matter jurisdiction grant for maritime claims, Defendant's objective belief is reasonable. Furthermore, Plaintiff's allegation that there have been "months of delay" is unpersuasive in light of the fact the suit is less than four months old, negotiations have not been completed, one of the defendants, CB Engineering, Inc., who is named in the Complaint has yet to be served, and Plaintiff has not yet made a demand in the case. An award of costs and fees is not warranted on the record before the Court.

III. Defendant's Motion to Strike

Because the Court grants Plaintiff's motion to remand, Defendant's motion to strike portions of Plaintiff's complaint is **DENIED** as moot.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's [*10] Motion to Remand, **DENIES** Plaintiff's request for attorney's fees, and **DENIES** Defendant's motion to strike as moot.

IT IS SO ORDERED.

Dated: July 11, 2005

MARTIN J. JENKINS

UNITED STATES DISTRICT JUDGE

CARNIVAL CRUISE LINES v. SHUTE ET VIR, 111 S. Ct. 1522, 499 U.S. 585 (U.S. 04/17/1991)

[1] SUPREME COURT OF THE UNITED STATES

[2] No. 89-1647

[3] 111 S. Ct. 1522, 499 U.S. 585, 113 L. Ed. 2d 622, 59 U.S.L.W. 4323, 1991.SCT.42217 <http://www.versuslaw.com>

[4] decided: April 17, 1991.

[5] **CARNIVAL CRUISE LINES, INC**
v.
SHUTE ET VIR

[6] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

[7] Richard K. Willard argued the cause for petitioner. With him on the briefs were David L. Roll and Lawrence D. Winson.

[8] Gregory J. Wall argued the cause and filed a brief for respondents.*fn*

[9] Blackmun, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, Scalia, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined, post, p. 597.

[10] Author: Blackmun

[11] In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute.

[12] I

[13] The Shutes, through an Arlington, Wash., travel agent, purchased passage for a 7-day

cruise on petitioner's ship, the Tropicale. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Fla. Petitioner then prepared the tickets and sent them to respondents in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition:

[14] "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT -- ON LAST PAGES 1, 2, 3" App. 15.

[15] The following appeared on "contract page 1" of each ticket:

[16] " TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

[17] "3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

[18] "8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U. S. A., to the exclusion of the Courts of any other state or country." Id., at 16.

[19] The last quoted paragraph is the forum-selection clause at issue.

[20] II

[21] Respondents boarded the Tropicale in Los Angeles, Cal. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employees. Id., at 4.

[22] Petitioner moved for summary judgment, contending that the forum clause in respondents' tickets required the Shutes to bring their suit against petitioner in a court in the State of Florida. Petitioner contended, alternatively, that the District Court lacked personal jurisdiction over petitioner because petitioner's contacts with the State of Washington were insubstantial. The District Court granted the motion, holding that petitioner's contacts with Washington were constitutionally insufficient to support the exercise of personal jurisdiction. See App. to Pet. for Cert. 60a.

[23] The Court of Appeals reversed. Reasoning that "but for" petitioner's solicitation of business in Washington, respondents would not have taken the cruise and Mrs. Shute would not have been injured, the court concluded that petitioner had sufficient contacts with Washington to justify the District Court's exercise of personal jurisdiction. 897 F.2d 377, 385-386 (CA9 1990).*fn* Turning to the forum-selection clause, the Court of Appeals acknowledged that a court concerned with the enforceability of such a clause must begin its analysis with The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." Id., at 9-10. See 897 F.2d, at 388. The appellate court concluded that the forum clause should not be enforced because it "was not freely bargained for." Id., at 389. As an "independent justification" for refusing to enforce the clause, the Court of Appeals noted that there was evidence in the record to indicate that "the Shutes are physically and financially incapable of pursuing this litigation in Florida" and that the enforcement of the clause would operate to deprive them of their day in court and thereby contravene this Court's holding in The Bremen. 897 F.2d, at 389.

[24] We granted certiorari to address the question whether the Court of Appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. 498 U.S. 807-808 (1990). Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. See Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case,'" quoting Burton v. United States, 196 U.S. 283, 295 (1905)).

[25] III

[26] We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize. See Archawski v. Hanioti, 350 U.S. 532, 533 (1956); The Moses Taylor, 4 Wall. 411, 427 (1867); Tr. of Oral Arg. 36-37, 12, 47-48. Cf. Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 28-29 (1988). Second, we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. Brief for Respondents 26 ("The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated"). Additionally, the Court of Appeals evaluated the enforceability of the forum clause under the assumption, although "doubtful," that respondents could be deemed to have had knowledge of the clause. See 897 F.2d, at 389, and n. 11.

[27] Within this context, respondents urge that the forum clause should not be enforced because, contrary to this Court's teachings in The Bremen, the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court. Additionally, respondents contend that the clause violates the Limitation of Vessel Owner's Liability Act, 46 U. S. C. App. § 183c. We consider these arguments in turn.

[28] IV

[29] A

[30] Both petitioner and respondents argue vigorously that the Court's opinion in The Bremen governs this case, and each side purports to find ample support for its position in that opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and The Bremen, differences that preclude an automatic and simple application of The Bremen 's general principles to the facts here.

[31] In The Bremen, this Court addressed the enforceability of a forum-selection clause in a contract between two business corporations. An American corporation, Zapata, made a contract with Unterweser, a German corporation, for the towage of Zapata's oceangoing drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. The agreement provided that any dispute arising under the contract was to be resolved in the London Court of Justice. After a storm in the Gulf of Mexico seriously damaged the rig, Zapata ordered Unterweser's ship to tow the rig to Tampa, Fla., the nearest point of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal court at Tampa. Citing the forum clause, Unterweser moved to dismiss. The District Court denied Unterweser's motion, and the Court of Appeals for the Fifth Circuit, sitting en banc on rehearing, and by a sharply divided vote, affirmed. In re Complaint of Unterweser Reederei, GmBH, 446 F.2d 907 (1971).

[32] This Court vacated and remanded, stating that, in general, " a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." 407 U.S., at 12-13 (footnote omitted). The Court further generalized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." Id., at 15. The Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in The Bremen and that, presumably, would be pertinent in any determination whether to enforce a similar clause.

[33] In this respect, the Court noted that there was "strong evidence that the forum clause was a vital part of the agreement, and [that] it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." Id., at 14 (footnote omitted). Further, the Court observed that it was not "dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum," and that in such a case, "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." Id., at 17. The Court stated that even where the forum clause establishes a remote forum for

resolution of conflicts, "the party claiming [unfairness] should bear a heavy burden of proof." Ibid.

[34] In applying The Bremen, the Court of Appeals in the present litigation took note of the foregoing "reasonableness" factors and rather automatically decided that the forum-selection clause was unenforceable because, unlike the parties in The Bremen, respondents are not business persons and did not negotiate the terms of the clause with petitioner. Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner. The Bremen concerned a "far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." Id., at 13. These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in The Page 593} Bremen to have expected Unterweser and Zapata to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract.

[35] In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. See, e. g., Hodes v. S. N. C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 910 (CA3 1988), cert. dism'd, 490 U.S. 1001 (1989). In this context, it would be entirely unreasonable for us to assume that respondents -- or any other cruise passenger -- would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in The Bremen.

[36] In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of The Bremen to account for the realities of form passage contracts. As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. See The Bremen, 407 U.S., at 13, and n. 15; Hodes, 858 F.2d, at 913. Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. See Stewart Organization, 487 U.S., at 33 (concurring opinion). Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by

limiting the fora in which it may be sued. Cf. Northwestern Nat. Ins. Co. v. Donovan, 916 F.2d 372, 378 (CA7 1990).

[37] We also do not accept the Court of Appeals' "independent justification" for its conclusion that The Bremen dictates that the clause should not be enforced because "there is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." 897 F.2d, at 389. We do not defer to the Court of Appeals' findings of fact. In dismissing the case for lack of personal jurisdiction over petitioner, the District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida. The Court of Appeals' conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience. Furthermore, the Court of Appeals did not place in proper context this Court's statement in The Bremen that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 U.S., at 17. The Court made this statement in evaluating a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." Ibid. In the present case, Florida is not a "remote alien forum," nor -- given the fact that Mrs. Shute's accident occurred off the coast of Mexico -- is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida. In light of these distinctions, and because respondents do not claim lack of notice of the forum clause, we conclude that they have not satisfied the "heavy burden of proof," ibid., required to set aside the clause on grounds of inconvenience.

[38] It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

[39] B

[40] Respondents also contend that the forum-selection clause at issue violates 46 U. S. C. App. § 183c. That statute, enacted in 1936, see ch. 521, 49 Stat. 1480, provides:

[41] "It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated

amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect."

[42] By its plain language, the forum-selection clause before us does not take away respondents' right to "a trial by [a] court of competent jurisdiction" and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought "if at all," in a court "located in the State of Florida," which, plainly, is a "court of competent jurisdiction" within the meaning of the statute.

[43] Respondents appear to acknowledge this by asserting that although the forum clause does not directly prevent the determination of claims against the cruise line, it causes plaintiffs unreasonable hardship in asserting their rights and therefore violates Congress' intended goal in enacting § 183c. Significantly, however, respondents cite no authority for their contention that Congress' intent in enacting § 183c was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § 183c suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that "the question of liability and the measure of damages shall be determined by arbitration." See S. Rep. No. 2061, 74th Cong., 2d Sess., 6 (1936); H. R. Rep. No. 2517, 74th Cong., 2d Sess., 6 (1936). See also, Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess., pt. 4, pp. 20, 36-37, 57, 109-110, 119 (1936). There was no prohibition of a forum-selection clause. Because the clause before us allows for judicial resolution of claims against petitioner and does not purport to limit petitioner's liability for negligence, it does not violate § 183c.

[44] V

[45] The judgment of the Court of Appeals is reversed.

[46] It is so ordered.

[47] Disposition

[48] 897 F.2d 377, reversed.

[49] Justice Stevens, with whom Justice Marshall joins, dissenting.

[50] The Court prefaces its legal analysis with a factual statement that implies that a purchaser of a Carnival Cruise Lines passenger ticket is fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket. See ante, at 587-588. Even if this implication were accurate, I would disagree with the Court's analysis. But, given the Court's preface, I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.

[51] Of course, many passengers, like the respondents in this case, see ante, at 587, will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16 (a), which provides that "the Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling -- without a refund -- a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable. Cf. Steven v. Fidelity & Casualty Co. of New York, 58 Cal. 2d 862, 883, 377 P. 2d 284, 298 (1962) (refusing to enforce limitation on liability in insurance policy because insured "must purchase the policy before he even knows its provisions").

[52] Even if passengers received prominent notice of the forum-selection clause before they committed the cost of the cruise, I would remain persuaded that the clause was unenforceable under traditional principles of federal admiralty law and is "null and void" under the terms of Limitation of Vessel Owner's Liability Act, ch. 521, 49 Stat. 1480, 46 U. S. C. App. § 183c, which was enacted in 1936 to invalidate expressly stipulations limiting shipowners' liability for negligence.

[53] Exculpatory clauses in passenger tickets have been around for a long time. These clauses are typically the product of disparate bargaining power between the carrier and the passenger, and they undermine the strong public interest in deterring negligent conduct. For these reasons, courts long before the turn of the century consistently held such clauses unenforceable under federal admiralty law. Thus, in a case involving a ticket provision purporting to limit the shipowner's liability for the negligent handling of baggage, this Court wrote:

[54] "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the Baltimore & Ohio &c; Railway v. Voigt, 176 U.S. 498, 505, 507, and Knott v. Botany Mills, 179 U.S. 69, 71, where the

previously adjudged cases are referred to and the principles by them expounded are restated." The Kensington, 183 U.S. 263, 268 (1902).

[55] Clauses limiting a carrier's liability or weakening the passenger's right to recover for the negligence of the carrier's employees come in a variety of forms. Complete exemptions from liability for negligence or limitations on the amount of the potential damage recovery,[*fn1] requirements that notice of claims be filed within an unreasonably short period of time,[*fn2] provisions mandating a choice of law that is favorable to the defendant in negligence cases,[*fn3] and forum-selection clauses are all similarly designed to put a thumb on the carrier's side of the scale of justice.[*fn4] Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms. See, e. g., Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1179-1180 (1983); Slawson, Mass Contracts: Lawful Fraud in California, 48 S. Cal. L. Rev. 1, 12-13 (1974); K. Llewellyn, The Common Law Tradition 370-371 (1960).

[56] The common law, recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness. Judge J. Skelly Wright set out the state of the law succinctly in Williams v. Walker-Thomas Furniture Co., 121 U. S. App. D.C. 315, 319-320, 350 F.2d 445, 449-450 (1965) (footnotes omitted):

[57] "Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."

[58] See also Steven, 58 Cal. 2d, at 879-883, 377 P. 2d, at 295-297; Henningsen v. Bloomfield Motors, Inc., 32 N. J. 358, 161 A. 2d 69 (1960).

[59] The second doctrinal principle implicated by forum-selection clauses is the traditional rule that "contractual provisions, which seek to limit the place or court in which an action may . . . be brought, are invalid as contrary to public policy." See Dougherty, Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought, 31 A. L.

R. 4th 404, 409, § 3 (1984). See also Home Insurance Co. v. Morse, 20 Wall. 445, 451 (1874). Although adherence to this general rule has declined in recent years, particularly following our decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. See 31 A. L. R. 4th, at 409-438 (citing cases). A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law before our decision in The Bremen, see 407 U.S., at 9, and n. 10, and, in my opinion, remains unenforceable under the prevailing rule today.

[60] The Bremen, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in American courts,*fn5 but held that the doctrine of those cases did not extend to commercial arrangements between parties with equal bargaining power.

[61] The federal statute that should control the disposition of the case before us today was enacted in 1936 when the general rule denying enforcement of forum-selection clauses was indisputably widely accepted. The principal subject of the statute concerned the limitation of shipowner liability, but as the following excerpt from the House Report explains, the section that is relevant to this case was added as a direct response to shipowners' ticketing practices.

[62] "During the course of the hearings on the bill (H. R. 9969) there was also brought to the attention of the committee a practice of providing on the reverse side of steamship tickets that in the event of damage or injury caused by the negligence or fault of the owner or his servants, the liability of the owner shall be limited to a stipulated amount, in some cases $5,000, and in others substantially lower amounts, or that in such event the question of liability and the measure of damages shall be determined by arbitration. The amendment to chapter 6 of title 48 of the Revised Statutes proposed to be made by section 2 of the committee amendment is intended to, and in the opinion of the committee will, put a stop to all such practices and practices of a like character." H. R. Rep. No. 2517, 74th Cong., 2d Sess., 6-7 (1936) (emphasis added); see also S. Rep. No. 2061, 74th Cong., 2d Sess., 6-7 (1936). The intent to "put a stop to all such practices and practices of a like character" was effectuated in the second clause of the statute. It reads:

[63] "It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of

competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect." 46 U. S. C. App. § 183c (emphasis added).

[64] The stipulation in the ticket that Carnival Cruise sold to respondents certainly lessens or weakens their ability to recover for the slip and fall incident that occurred off the west coast of Mexico during the cruise that originated and terminated in Los Angeles, California. It is safe to assume that the witnesses -- whether other passengers or members of the crew -- can be assembled with less expense and inconvenience at a west coast forum than in a Florida court several thousand miles from the scene of the accident.

[65] A liberal reading of the 1936 statute is supported by both its remedial purpose and by the legislative history's general condemnation of "all such practices." Although the statute does not specifically mention forum-selection clauses, its language is broad enough to encompass them. The absence of a specific reference is adequately explained by the fact that such clauses were already unenforceable under common law and would not often have been used by carriers, which were relying on stipulations that purported to exonerate them from liability entirely. Cf. Moskal v. United States, 498 U.S. 103, 110-113 (1990).

[66] The Courts of Appeals, construing an analogous provision of the Carriage of Goods by Sea Act, 46 U. S. C. App. § 1300 et seq., have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions. See, e. g., Hughes Drilling Fluids v. M/V Luo Fu Shan, 852 F.2d 840 (CA5 1988), cert. denied, 489 U.S. 1033 (1989); Union Ins. Soc. of Canton, Ltd. v. S. S. Elikon, 642 F.2d 721, 724-725 (CA4 1981); Indussa Corp. v. S. S. Ranborg, 377 F.2d 200, 203-204 (CA2 1967). Commentators have also endorsed this view. See, e. g., G. Gilmore & C. Black, The Law of Admiralty 145, and n. 23 (2d ed. 1975); Mendelsohn, Liberalism, Choice of Forum Clauses and the Hague Rules, 2 J. of Maritime Law & Comm. 661, 663-666 (1971). The forum-selection clause here does not mandate suit in a foreign jurisdiction, and therefore arguably might have less of an impact on a plaintiff's ability to recover. See Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294 (CA1 1974). However, the plaintiffs in this case are not large corporations but individuals, and the added burden on them of conducting a trial at the opposite end of the country is likely proportional to the additional cost to a large corporation of conducting a trial overseas.[*fn6]

[67] Under these circumstances, the general prohibition against stipulations purporting "to lessen, weaken, or avoid" the passenger's right to a trial certainly should be construed to apply to the manifestly unreasonable stipulation in these passengers' tickets. Even without the benefit of the statute, I would continue to apply the general rule that prevailed prior to our decision in The Bremen to forum-selection clauses in passenger tickets.

[68] I respectfully dissent.

[69] Counsel FOOTNOTES

[70] * Briefs of amici curiae urging reversal were filed for the Chamber of Commerce of the United States by Herbert L. Fenster, Stanley W. Landfair, and Robin S. Conrad; and for the International Committee of Passenger Lines by John A. Flynn and James B. Nebel.

Opinion Footnotes

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[71] *fn* The Court of Appeals had filed an earlier opinion also reversing the District Court and ruling that the District Court had personal jurisdiction over the cruise line and that the forum-selection clause in the tickets was unreasonable and was not to be enforced. 863 F.2d 1437 (CA9 1988). That opinion, however, was withdrawn when the court certified to the Supreme Court of Washington the question whether the Washington long-arm statute, Wash. Rev. Code § 4.28.185 (1988), conferred personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes. See 872 F.2d 930 (1989). The Washington Supreme Court answered the certified question in the affirmative on the ground that the Shutes' claim "arose from" petitioner's advertisement in Washington and the promotion of its cruises there. 113 Wash. 2d 763, 783 P. 2d 78 (1989). The Court of Appeals then "refiled" its opinion "as modified herein." See 897 F.2d, at 380, n. 1.

Dissent Footnotes

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[72] *fn1 See 46 U. S. C. App. § 183c:

"It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated

amount, for such loss or injury. . . ."

[73] *fn2 See 46 U. S. C. App. § 183b(a):

"It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred." See also 49 U. S. C. § 11707(e) ("A carrier or freight forwarder may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section").

[74] *fn3 See, e. g., The Kensington, 183 U.S. 263, 269 (1902) (refusing to enforce clause requiring that all disputes under contract for passage be governed by Belgian law because such law would have favored the shipowner in violation of United States public policy).

[75] *fn4 All these clauses will provide passengers who purchase tickets containing them with a "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting [its exposure to liability]." See ante, at 594. Under the Court's reasoning, all these clauses, including a complete waiver of liability, would be enforceable, a result at odds with longstanding jurisprudence.

[76] *fn5 "In [Carbon Black Export, Inc. v. The Monrosa, 254 F.2d 297 (CA5 1958), cert. dism'd, 359 U.S. 180 (1959),] the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that 'agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.' 254 F.2d, at 300-301." The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 6 (1972).

[77] *fn6 The Court does not make clear whether the result in this case would also apply if the clause required Carnival passengers to sue in Panama, the country in which Carnival is incorporated.

19910417

Supreme Court of Washington,
En Banc.
Certification from the United States Court of Appeals for the Ninth Circuit in
Eulala SHUTE and Russel Shute, Appellants,
v.
CARNIVAL CRUISE LINES, Appellee.
No. 56089-7.
Dec. 7, 1989.

Passenger injured on cruise ship in international waters brought suit against cruise operator, a Panamanian corporation with its principal place of business in Florida. The United States District Court for the Western District of Washington, Carolyn R. Dimmick, J., granted summary judgment in favor of cruise operator, and passenger appealed. The Court of Appeals, 863 F.2d 1437, reversed. The Court then withdrew its opinion, 872 F.2d 930 (memorandum decision), and certified question. The Supreme Court, Smith, J., held that claim for negligent injury occurring on ocean cruise in international waters "arose from" cruise operator's advertisement and promotion in the state of its cruises, and jurisdiction existed under long-arm statute.
Question answered.

West Headnotes

[1] KeyCite Notes

101 Corporations
101XVI Foreign Corporations
101k663 Actions by or Against
101k665 Jurisdiction
101k665(1) k. Facts and Circumstances Conferring Jurisdiction. Most Cited Cases

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases

In order to subject nonresident defendants and foreign corporations to in personam jurisdiction, nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in forum state; cause of action must arise from, or be connected with, such act or transaction; and assumption of jurisdiction by forum state must not offend traditional notions of fair play and substantial justice. West's RCWA 4.28.185; U.S.C.A. Const.Amend. 14.

[2] KeyCite Notes

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.25) k. Tort Cases. Most Cited Cases

Claim for negligent injury occurring on ocean cruise in international waters "arose from" cruise operator's advertisement and promotion in the state of its cruises, and jurisdiction existed under

long-arm statute. West's RCWA 4.28.185(1)(a).

[3] KeyCite Notes

106 Courts
106I Nature, Extent, and Exercise of Jurisdiction in General
106k10 Jurisdiction of the Person
106k12 Domicile or Residence of Party
106k12(2) Actions by or Against Nonresidents; "Long-Arm" Jurisdiction in General
106k12(2.10) k. Defendant's Activities in Forum State; Cause of Action Arising Therefrom. Most Cited Cases

Claim "arises from" nonresident defendant's act or transaction in the state, within meaning of long-arm statute, if cause of action could not have arisen but for activities of nonresident defendant in the forum. West's RCWA 4.28.185.

***78 *764** Wall & Hinrichs, Gregory J. Wall, Seattle, for appellants.
Bogle & Gates, Jonathan Rodriguez-Atkatz, Seattle, for appellee.

SMITH, Justice.
A Washington resident, injured on a cruise ship in international waters off the coast of Mexico, brought suit against the cruise operator, a Panamanian corporation with its principal place of business in Florida, under the Washington "long-arm" statute, RCW 4.28.185. The United States Court of Appeals for the Ninth Circuit certified to this court the question whether personal jurisdiction over the cruise ship operator exists under the statute. Unless limited by the terms of the statute, our courts may assert jurisdiction over nonresident defendants to the extent permitted by federal due process. We therefore answer the certified question "yes."
The sole question presented by this case is whether a claim for negligent injury occurring on an ocean **cruise** ship in international waters can be said, within the meaning of our state's long-arm statute, to "arise from" advertisement and promotion in Washington of its **cruises** by a foreign corporation.
***765** Appellee **Carnival Cruise Lines**, Inc. (**Carnival),** is a Panamanian corporation with its principal place of business in Florida. ***79** Appellants Eulala and Russel Shute are Washington residents who purchased ocean **cruise** fares from **Carnival** through a Snohomish County travel agency in March 1986.
The **cruise** ship, the *M/V Tropicale,* embarked from Los Angeles, California, on April 13, 1986, en route to Mexico. On April 15, 1986, during a guided tour of the ship's galley, Mrs. Eulala Shute slipped, fell, and was injured. The ship was in international waters off the coast of Mexico at the time. The Shutes filed this case as an action in Admiralty in the United States District Court for the Western District of Washington.
The trial court, the Honorable Carolyn R. Dimmick, by order dated June 25, 1987, granted summary judgment in favor of Carnival, dismissing the claim because the cause of action did not "arise out of" or "result from" the defendant's contacts with the state of Washington.
In its opinion, issued December 12, 1988, the United States Court of Appeals for the Ninth Circuit reversed the District Court. *Shute v. Carnival Cruise Lines,* 863 F.2d 1437 (9th Cir.1988), *withdrawn,* 872 F.2d 930 (1989). Carnival moved for reconsideration. While that motion was pending, on February 6, 1989, the Washington Court of Appeals, Division One, issued its opinion in *Banton v. Opryland U.S.A., Inc.,* 53 Wash.App. 409, 767 P.2d 584 (1989), interpreting the Washington long-arm statute and finding no jurisdiction on facts comparable to those in the Shutes' case. The United States Court of Appeals then withdrew its opinion and, by order dated April 24, 1989, certified the following question to this court:
Would the Washington long-arm statute establish personal jurisdiction over **Carnival Cruise Lines** for the claim asserted by the Shutes?
***766 Carnival's** only contacts with the State of Washington consist of advertisements in Washington newspapers, promotional materials provided to Washington travel agencies, and seminars conducted by **Carnival's** personnel for travel agencies in promotion of its **cruises. Carnival** maintains no office, owns no real estate in the state of Washington, and has no Washington business license.

The tickets issued by **Carnival** contained contract clauses designating Florida as the forum for any litigation. They were issued in Florida and forwarded to Washington. **Carnival** provided neither transportation nor services to the Shutes before they boarded the *M/V Tropicale* in Los Angeles. There is no indication that the *M/V Tropicale* nor any of **Carnival's** other vessels has ever called at a Washington port.

The United States Court of Appeals for the Ninth Circuit concluded in this case that although due process does not permit *general jurisdiction,* it does permit *specific jurisdiction.* Shute v. Carnival Cruise Lines, 863 F.2d 1437 (9th Cir.1988), *withdrawn,* 872 F.2d 930 (1989). [FN1] Thus, the only inquiry remaining for this court is whether Washington's long-arm statute precludes jurisdiction on the facts of this case. *See* Grange Ins. Ass'n v. State, 110 Wash.2d 752, 756, 757 P.2d 933 (1988).

FN1. Although an opinion which has been withdrawn has no precedential value, we agree with the reasoning of the United States Court of Appeals for the Ninth Circuit in *Shute.*

The "long-arm" statute, RCW 4.28.185(1)(a) provides in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

It is well established in Washington "that under the long-arm statute, RCW 4.28.185, our courts may assert ***767** jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute." *Deutsch v. West Coast Mach. Co.,* 80 Wash.2d 707, 711, 497 P.2d 1311, *cert. denied,* ****80** 409 U.S. 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972). We are thus asked to determine what limits are provided by the statute.

Our long-arm statute is patterned after the Illinois statute. *Tyee Constr. Co. v. Dulien Steel Prods., Inc.,* 62 Wash.2d 106, 109, 381 P.2d 245 (1963). The Illinois statute "reflects on the part of the legislature 'a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.' " *Tyee Constr. Co. v. Dulien Steel Prods., Inc.,* 62 Wash.2d 106, 109, 381 P.2d 245 (1963) (quoting *Nelson v. Miller,* 11 Ill.2d 378, 389, 143 N.E.2d 673 (1957)). *See also* E. Cleary & A. Seder, *Extended Jurisdictional Bases for the Illinois Courts,* 50 Nw.U.L.Rev. 599 (1956). The same has been said of RCW 4.28.185. *See, e.g.,* Note, *In Personam Jurisdiction Expanded--Force and Effect of Service of Process Outside of State,* 34 Wash.L.Rev. 323, 326, 329 (1959). We interpret the statute relying upon this conceptual foundation.

[1] In order to subject nonresident defendants and foreign corporations to the *in personam* jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;

(2) the cause of action must arise from, or be connected with, such act or transaction; and

(3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Deutsch v. West Coast Mach. Co., 80 Wash.2d 707, 711, 497 P.2d 1311, (citing *Oliver v. American Motors Corp.,* 70 Wash.2d 875, 425 P.2d 647 (1967) and ***768** *Tyee Constr. Co. v. Dulien Steel Prods., Inc.,* 62 Wash.2d 106, 381 P.2d 245 (1963)), *cert. denied,* 409 U.S. 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972). In *Werner v. Werner,* 84 Wash.2d 360, 365, 526 P.2d 370 (1974), the court noted that:

These factors are, in part, a distillation of the due process standards announced in *International Shoe Co. v. Washington,* [326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945)], and refined in *Hanson v. Denckla,* [357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)]; *Travelers Health Ass'n v. Virginia,* 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154, (1950); *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

Thus, when the federal courts regard the due process standard and the statutory standard under RCW 4.28.185 as a single inquiry, [FN2] it is based upon a concept firmly rooted in our case law.

FN2. *E.g.*, *Pedersen Fisheries, Inc. v. Patti Indus. Inc.*, 563 F.Supp. 72, 74 (W.D.Wash.1983); *Shute v.* ***Carnival Cruise Lines***, 863 F.2d 1437, 1440 n. 1 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989).

[2] The United States Court of Appeals for the Ninth Circuit concluded that **Carnival's** actions were more than sufficient to satisfy the requirements of due process. *Shute v.* ***Carnival Cruise Lines***, 863 F.2d 1437, 1442 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989). **Carnival's** solicitation of business in this state was purposefully directed at Washington residents. We find this sufficient to constitute a "purposeful act" under the *first prong* of our statutory test.

The federal appellate court also concluded that "jurisdiction over Carnival is reasonable in this case." *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1446 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989). We agree. Given Carnival's efforts to exploit the Washington market, we cannot say that it would offend "traditional notions of fair play and justice" for Washington to assert jurisdiction. Thus, the *third prong* of our statutory test is satisfied.

****81*** As a result of the holdings by the trial and appellate courts in *Shute* and by our Court of Appeals in *Banton*, ***769*** this case turns on the *second prong* of our statutory test--whether the Shutes' claim "arises from" Carnival's promotional efforts in Washington within the meaning of RCW 4.28.185.

Our statutory test, first announced in *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wash.2d 106, 381 P.2d 245 (1963), was adapted from a law review case note. *See Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wash.2d 106, 115 n. 1, 381 P.2d 245 (1963). In considering whether a cause of action "arises from" a party's contacts with a forum state, the article anticipated that a "cause of action might come to fruition in another state, but because of activities of defendant in the forum state there would still be a 'substantial minimum contact.' " Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo.L.J. 342, 351 (1958). The article later stated:

From the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen *but for the activities of the nonresident firm in the forum where it is ultimately sued.*

(Italics ours.). Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo.L.J. 342, 355 (1958).

The United States Court of Appeals for the Ninth Circuit adopted essentially this same "but for" analysis for the "arising from" prong of its test to determine whether the exercise of specific jurisdiction comports with due process. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989).

The "but for" test has been criticized. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F.Supp. 971, 975 (D.Kan.1986); *Russo v. Sea World of Florida, Inc.*, 709 F.Supp. 39, 42 (D.R.I.1989). However, any criticism that the "test" reaches too far is answered by the federal court's tempering of its "but for" test with an additional consideration. "If the connection between the defendant's forum related activities [and the claim] is 'too attenuated,' the exercise of ***770*** jurisdiction would be unreasonable". *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989).

While other tests or rules have been suggested, we do not consider them appropriate for adoption by this court. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F.Supp. 971 (D.Kan.1986) (contact must attach duty alleged to be breached); *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir.1986) (contact must be a material element of proof of claim); *Banton v. Opryland U.S.A., Inc.*, 53 Wash.App. 409, 767 P.2d 584 (1989) (contact must be a proximate cause of the injury).

Relying on *Banton v. Opryland U.S.A., Inc.*, 53 Wash.App. 409, 767 P.2d 584 (1989), Carnival argues that the "but for" test extends jurisdiction too far. The United States Court of Appeals for the Ninth Circuit withdrew its opinion in this case after *Banton* interpreted RCW 4.28.185(1)(a). *Banton*, on facts comparable to the present case, denied jurisdiction under RCW 4.28.185(1)(a) because the

claim did not "arise from" the defendant's contacts with Washington. We therefore examine that decision.

The *Banton* court first noted that this State has little case law interpreting the "arising from" portion of the long-arm statute. *Banton v. Opryland U.S.A., Inc.*, 53 Wash.App. 409, 413, 767 P.2d 584 (1989). After observing that "[n]one of [the Washington] cases determine whether a suit for personal injuries suffered outside the forum against a foreign corporation 'arises from' that corporation's promotion and consummation of business transactions within the State", the court then looked to cases from other jurisdictions.

Among the cases relied upon by the court in *Banton* to "provide persuasive authority that Banton's cause of action does not arise from Opry's contacts in Washington", were *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir.1986) and *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir.1983). *See Banton v. Opryland U.S.A., Inc.*, 53 Wash.App. 409, 413, 767 P.2d 584 (1989). Both courts ***771** found no jurisdiction on facts ****82** comparable to those in this case. However, those cases employed a "proximate cause" analysis in determining whether a claim arises from forum contacts. *See Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989). Their reasoning was specifically rejected by the United States Court of Appeals for the Ninth Circuit.

Although the 1988 *Shute* opinion was available to the Washington Court of Appeals before it published *Banton* in February 1989, the briefs do not indicate that *Shute* was brought to the attention of the court. We thus conclude that Division One did not consider the *Shute* opinion when it decided *Banton* and that the result arguably would have been different if it had considered the then existing precedent from the Court of Appeals for the Ninth Circuit.

Carnival contends that the "great weight of authority" disfavors jurisdiction on comparable facts. [FN3] However, the authorities it cited are not controlling. We find them unpersuasive. We also note that other courts have asserted jurisdiction under circumstances similar to this case. [FN4]

FN3. *See, e.g., Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir.1986); *King v.* ***Carnival Cruise Lines***, No. 82-7291, 1984 WL 1423 (W.D.La. Mar. 9, 1984) (Westlaw, Allfeds database); *Alexander v.* ***Carnival*** *Tours, Inc.*, No. 86-A-1951, 1986 WL 14673 (D.Colo. Dec. 11, 1986) (Westlaw, Allfeds database); *Dirks v.* ***Carnival Cruise Lines***, 642 F.Supp. 971 (D.Kan.1986); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir.1964); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir.1983).

FN4. *See, e.g., Walker v.* ***Carnival Cruise Lines***, *Inc.*, 681 F.Supp. 470 (N.D.Ill.1987); *Everett v.* ***Carnival Cruise Lines***, 677 F.Supp. 269 (M.D.Pa.1987); *Wilkinson v.* ***Carnival Cruise Lines***, *Inc.*, 645 F.Supp. 318 (S.D.Tex.1985).

The federal circuits are divided on whether jurisdiction will lie under the circumstances present in this case. We cannot reconcile the division. We conclude that Washington's long-arm statute extends jurisdiction to the limit of federal due process. The United States Court of Appeals for the Ninth Circuit has determined that federal due process permits specific jurisdiction in this case. We will not ***772** deny Washington plaintiffs the benefit of that determination.

[3] We adopt the "but for" test of *Shute v.* ***Carnival Cruise Lines***, 863 F.2d 1437 (9th Cir.1988), *withdrawn*, 872 F.2d 930 (1989), and hold that there is sufficient connection between the Shutes' claim and **Carnival's** Washington contacts to support long-arm jurisdiction under RCW 4.28.185. "But for" **Carnival's** "transaction of any business within this state," Mrs. Eulala Shute would not have been injured on respondent's **cruise** ship. Therefore her claim "arises from" **Carnival's** Washington contacts within the meaning of Washington's long-arm statute.

We answer "yes" to the question certified to us in this case by the United States Court of Appeals for

the Ninth Circuit.

CALLOW, C.J., UTTER, BRACHTENBACH, DOLLIVER, DORE, ANDERSEN and DURHAM, JJ., and PEARSON, J. Pro Tem., concur.
Wash.,1989.
Shute v. Carnival Cruise Lines
113 Wash.2d 763, 783 P.2d 78
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IN THE COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

JACK OLTMAN and SUSAN OLTMAN, husband and wife, and BERNICE OLTMAN, Plaintiffs v. HOLLAND AMERICA LINE and HOLLAND AMERICA LINE WESTOURS, INC. Defendants	**No. 56873-6-I** **Proof of Service of:** Appellants' Reply Brief

PROOF OF SERVICE

I, Noah Davis, do hereby certify that I caused served a copy of the "Appellants' Reply Brief" upon the following parties:

Defendants Holland America Line and Holland America Line Westours, Inc., through their counsel of record, John P. Hayes. Forsberg Umlauf. 900 4th Ave, Ste 1700. Seattle WA 98164.

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By having a courier personally serve a copy of the same on March 23, 2006, at approximately 5pm.

DATED this 23rd day of March 2006.

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